DOCUMENT PRODUCTION AND THE FIFTH AMENDMENT

I. Introduction: Purpose and Scope of the Fifth Amendment Right Against Self-Incrimination

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

There is no way to present the full depth and exploration of the origins of the Fifth Amendment Privilege Against Self-Incrimination in even a scholarly article let alone a CLE one-hour seminar. Nonetheless, it is useful to at least have a very basis understanding of the origins of this critical right enjoyed by citizens of the United States. The Supreme Court has traced the roots of the Fifth Amendment to protections the English courts and parliament granted to religious dissenters who were compelled to take the oaths when called before the Ecclesiastical Courts. This process was known as the *oath ex officio* and the English common law courts eventually prohibited the use of the *oath ex officio* by relying on the Latin maxim *nemo tentetur seipsum prodere* – “no man is bound to accuse himself.” *See Brown v. Walker*, 161 U.S. 591,
In addition, legal philosophers such as Thomas Hobbs in his work *Leviathan* used natural law as the basis for justifying the principal, asserting it was unnatural for a human being to give evidence against himself under compulsion.

As an outgrowth of the Constitutional Convention of 1787, pressure for a Bill of Rights eventually resulted in the prohibition against self-incrimination being included in the Fifth Amendment to the Bill of Rights which was ultimately ratified in 1789. Although after ratification, the right was understood in a much more limited form to guard against improper methods for gaining confessions, by the end of the 19th Century, our modern concept of the right to remain silent became well established (at least in the federal courts). *See Councilman v. Hitchcock*, 142 U.S. 547 (1892) (discussed in *Salky and Hines*, supra at p. 3).

Finally, as part of this introduction, I do think it important that we, as lawyers, whether we are prosecutors, criminal defense attorneys, or civil litigators, should keep in mind the high degree of reverence with which the United States Supreme Court has historically, despite occasional detours, regarded the Fifth Amendment privilege.

In *Ullmann v. United States*, 350 U.S. 422 (1956), Justice Frankfurter stated as follows:

This Constitutional protection must not be interpreted in a hostile or (stingy) spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying states. The founders of the nation were naive or disregardful of the interest of justice … they made a judgment, and expressed in our fundamental law, that it were better for an occasional crime to go
unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused. The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application.

*Ullman*, 350 U.S. at 426-27 (emphasis added).

So, when beginning our analysis of whether or not Fifth Amendment privilege attaches in any way to a situation, let us not be fearful or timid in asserting the right, and there are plenty of cases, some of which will be discussed in a moment, where the United States Supreme Court reaffirms the position that the Fifth Amendment is not merely a protection for those guilty of crimes.

**II. Scope of the Fifth Amendment**

Lest there be any doubt, the Fifth Amendment privilege is not limited in terms of the type of proceeding to which it applies and it may be asserted in any proceeding at which testimony may be required or compelled. See, e.g., *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (The Fifth Amendment privilege is “not ordinarily dependent upon the nature of the proceedings in which the testimony is sought or is to be used. It applies alike to criminal and civil proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.” See also *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (“The Fifth Amendment can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects any disclosures which the witness reasonably believes could be used in criminal prosecution or could lead to other evidence that might be so used.”) (emphasis added).
III. Stigma and the Fifth Amendment

Often, particularly governmental, in business or white collar settings, a potential witness will be reluctant to assert the Fifth Amendment privilege because the invocation of the privilege carries with it a stigma that the individual has acted in violation of the criminal law. (This has occurred recently in connection with Secretary Clinton’s emails – by some officials (aides). “While perceptions of the Fifth Amendment as a refuge for the guilty may never be totally erased, the stigma associated with asserting the Fifth Amendment privilege against self-incrimination is often exaggerated, because the Fifth Amendment also protects the innocent.” Salky and Hines, supra at p. 195.

The United States Supreme Court, in the case of Ohio v. Reiner, 532 U.S. 17 (2001), stands as a powerful reminder that “truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the Government with incriminating evidence from the speaker’s own mouth” and, thereby, are protected from compulsory testimony by the Fifth Amendment. Id. at 21 (emphasis added).

The Reiner case concerned a prosecution of a father for involuntary manslaughter of his two-year old child as a result of abuse. The father’s defense theory was that the child’s babysitter was the culpable party and the babysitter asserted her Fifth Amendment privilege in response to being subpoenaed at the father’s trial because she, herself, had spent extended time alone with the baby prior to its death. Given this situation, which the Court referred to as ambiguous circumstances, the Court ruled unanimously that the sitter had a valid Fifth Amendment privilege not to testify even though she claimed innocence of the offense.
The right of an innocent individual to assert the Fifth Amendment has a longer historical source as evidenced in the case of *Bram v. United States*, 168 U.S. 532 (1897) where the Supreme Court reversed the conviction of a sailor who was accused of murdering the ship’s captain where the sailor, insisting he was innocent, nevertheless made a statement that was introduced against him at trial. The Supreme Court remarked that the Fifth Amendment protects everyone from *giving an explanation of their conduct* reasoning that “if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to bribe him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier [English] trials … made the system so odious as to give rise to a demand for its total abolition.” *Id.* at 544 (Above cases discussed in *Salky and Hines, supra* at 195-197).

**IV. Availability of the Privilege**

Frequently, questions will arise over whether a witness has a valid basis upon which to assert the Fifth Amendment. This area raises a number of interesting questions which can seem, at least at first, to be rather difficult to answer. For example, does a witness, testifying in a civil case, at which there appears to be no prosecutors, no law enforcement agents, and very little interest in the civil or administrative proceedings, have the right to assert a Fifth Amendment privilege? What about a witness who, whether the proceeding at which the witness has been subpoenaed, be a criminal or non-criminal proceeding, is compelled to testify because a prosecutor or other law enforcement authority with jurisdiction over the witness in a potential
criminal offense committed by the witness, assures the court that there is no intention to prosecute the witness?

The case law is clear that in order to sustain the privilege “it need only be evident from the implications of the question, and the setting in which it is asked, but a responsive answer to the question or an explanation on why it cannot be answered, might be dangerous because injurious disclosure could result. See Hoffman v. United States, 341 U.S. 479 (1951). The Court went on to indicate that a judge must accept the witness’s Fifth Amendment assertion unless it is perfectly clear that the witness is mistaken and that the answers cannot possibly have such a tendency to incriminate. Thus, Hoffman demands substantial deference by the courts to the witness’s assertion of the Fifth Amendment privilege. See Salky and Hines, supra at 137-138. In the Eleventh Circuit, it is clear that even a remote risk of a witness being prosecuted for criminal activities that his testimony might touch on is sufficient. “This determination does not depend upon a judge’s prediction of the likelihood of prosecution. Rather, it is only when there is but a fanciful possibility of prosecution that of claim of Fifth Amendment privilege is not well-taken. When a witness can demonstrate any possibility of prosecution which is more than fanciful, he has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster. In re Corrugated Container Anti-trust Litigation, 620 F.2d 1086 (5th Cir. 1980).”

V. Documents and the Fifth Amendment

Despite all of the above and well-founded constitutional protections afforded by the Fifth Amendment, in general, a question of whether the Fifth Amendment privilege against self-incrimination can prevent the production of documents which are subpoenaed is an entirely

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1 Binding precedent under Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), all Fifth Circuit cases are binding precedent in Eleventh Circuit if decided prior to October 1, 1981. See also United States v. Cuthel, 903 F.2d 1381, n.5 (“While there is arguably a conflict between a witness’ Fifth Amendment privilege and a defendant’s Sixth Amendment right to compulsory process, such conflict long ago was resolved in favor of the witness’ right to silence.” Alford v. United States, 282 U.S. 687, 694 (1931)”) (emphasis added).
different affair. The remainder of this outline will focus upon this question and will attempt to provide at least a rough framework for the beginning points of analysis. However, I should caution you that the case law in this area is literally all over the place and there are definitely cases which contradict one another. What I have attempted to do in this presentation is provide the practitioner with a road map upon which the practitioner can build a foundation for asserting the privilege against self-incrimination even in a document production context in those limited cases where the privilege is well-taken.

As a threshold matter, it is critical to determine whether or not the subpoena directed to a witness is one directed to an individual or some other entity. For example, a subpoena directed to an individual for business records might create a situation where the individual can assert a Fifth Amendment privilege and refuse to produce the records even though had the subpoena been directed to a corporation, for example, or other business entity, the individual might not have had a Fifth Amendment privilege.

VI. The Act of Production Doctrine

Although earlier Supreme Court cases, such as Boyd v. United States, 116 U.S. 616 (1886), protected the involuntary production of voluntarily created documents, the modern Supreme Court has limited the application of the Fifth Amendment to the act of production of documents in response to compulsion. “Only where the act of production is incriminating – by implicitly admitting the existence or possession of the documents sought, or that the documents are authentic – does the Fifth Amendment provide protection.” Salky and Hines, p. 235.

In the case of Fisher v. United States, 425 U.S. 391 (1976), the Supreme Court restricted Boyd’s application of the Fifth Amendment to the contents of voluntarily created documents. The Fisher court held that unless the Government required an individual to prepare
the papers subject to production or affirm the truth of their incriminating contents, no self-incriminating information contained within them is covered by the privilege.

In a subsequent decision, *United States v. Doe*, 465 U.S. 605 (1984), the Court considered a grand jury subpoena for the business records of the sole proprietorship. The lower court had quashed the subpoena, reasoning that the papers were protected because their contents were potentially self-incriminating and because the act of producing them to the Grand Jury would admit their existence and authenticity. However, the Supreme Court rejected the first ground of the decision holding that because the documents were created voluntarily and because the subpoena did not require the witness to re-state, repeat or affirm the truth of their contents, no Fifth Amendment privilege existed on that basis. Justice O’Connor concurring wrote separately in order to make the explicit point that the “Fifth Amendment” provides absolutely no protection for the contents of private papers of any kind.”

However, the Court accepted the findings of the lower court that in the particular circumstances of the case, the witness’s act of producing the documents would involve testimonial self-incrimination – by admitting their existence and his possession of them, as well as by authenticating them through his production.

Other decisions have held that the Fifth Amendment does not protect the witness’s/target’s/defendant’s personal calendar, appointment book, day planner, personal journals, diaries or other personal documents or papers. However, it is critical to understand that the Act of Production doctrine, as articulated in the *Doe* decision, does provide a valid objection to the production of voluntarily created personal papers or other tangible items. And, again, the basis for that protection is those situations where the witness, through the mere act of producing the documents, would, in fact, incriminate himself through testimony by explicitly or implicitly
admitting the existence of possession of those documents as well as by their authentication through his production of them. *See Doe* at 613-14 and notes 11-13 (Discussed in *Salky and Hines* at 236-237).

**The “foregone conclusion” exception to the Act of Production Doctrine**

Where it is clear from the facts that a document would have been discovered anyway, without the production of the document by the witness, then the Supreme Court has also held that the foregoing conclusion exception to the Act of Production doctrine applies to invalidate the act of production privilege. This would appear to be particularly the case where a number of other sources exist for documents and the Government merely is seeking to obtain from a witness documents which they can get from other sources with relative ease. However, as in the case of *United States v. Hubbell*, 530 U.S. 27, 45-46 (2000), the Court has articulated an exception to this exception where the witness is being forced to make “extensive use of the contents of his own mind” in identifying, sorting through, analyzing, cataloging, etc. a myriad of documents because the Court says this is tantamount to answering a series of interrogations regarding the existence and location of particular documents fitting certain broad descriptions.

**VII. What about those situations in which third parties are in possession of documents?**

In general, where a corporation is in possession of documents, a witness has little remedy available to prevent the third party from producing the documents. This is particularly so where the documents are themselves the property of a corporate entity. Further, the “required records” exception to the Act of Production doctrine means that corporations, who are obligated to keep records and comply with subpoenas as part of their charter and their existence as legal entities, or legal persons, have no ability to resist production even where the corporation is itself owned by only one individual or is otherwise a small closely held corporation. And this
“required records exception” does not just extend to corporations. It also can extend to even sole proprietorship businesses which are required to keep business records pursuant to other legal authority. See Shapiro v. United States, 335 U.S. 1, 32-35 (1948). In the Shapiro case, a target of a criminal investigation was not allowed to successfully claim Fifth Amendment protection to resist production of business records which he was statutorily required to maintain relating to federal regulations of prices during war time. (Note that this was even under the Boyd decision which at the time protected against compelled production of self-incriminating documents.) However, one important qualification to the general rule that a corporate officer made be made to testify as to the location or existence of corporate records. The Eleventh Circuit, in a 1996 case, reversed a finding of contempt entered by the Federal District Court and held that a custodian of corporate records may not be compelled to testify as to the location of documents not in her possession when that testimony would be self-incriminating. The custodian’s statement that she was not in possession of the documents sought was not a waiver of the privilege and that whether the custodian’s testimony would create a substantial and real fear of self-incrimination was a fact question for the District Court. This was the case of In re Grand Jury Subpoena Dated April 9, 1996, V. Smith, 87 F.3d 1198 (11th Cir. 1996).

The Government does not have the right, according to the Eleventh Circuit, to compel testimony concerning whether or not the document production is complete and thorough or whether any documents were omitted from production. See id. at 1200. “The government has no right to require the custodian to speak the contents of her mind when doing so would incriminate that person; to do so would be contrary to the spirit and letter of the Fifth Amendment. Id. at 1200-1201.
Of course, this analysis presumes that the custodian herself has a valid personal Fifth Amendment privilege to assert and, again, the reasonable apprehension of a fear of criminal prosecution must be personal as to the individual natural person who is serving as records custodian.

Further, should the Government seek to require the custodian to lay a business record foundation, at least one district court has not allowed that testimony to be compelled over a Fifth Amendment assertion. The court reasoned that requiring a custodian to qualify documents as “business records” will itself function as an independent incrimination separate and apart from the act of production itself. *In re Grand Jury Impaneled on April 6, 1993*, 869 F.Supp. 298, 306 (D.N.J. 1994).

The law in this area is complicated to say the least and I believe it would be helpful and instructive to have an extensive excerpt from the *In re Grant Jury Subpoena dated April 9, 1996* Eleventh Circuit decision. Accordingly, I have attached to this outline an excerpt of the Court’s opinion for your reference. This excerpt provides a good analysis in my opinion for understanding this complex issue, and in cases of closely held corporations in particular, is very helpful in determining the limits of interrogation concerning a required production of documents.
In the United States Court of Appeals for the Eleventh Circuit

In Re GRAND JURY SUBPOENA DATED APRIL 9, 1996

V.

Joan SMITH, Appellant

No. 96-4676

KRAVITCH, Circuit Judge:

Appellant has been held in civil contempt for refusing to testify before a grand jury on the ground that her testimony would incriminate her in violation of her rights under the Fifth Amendment. We reverse.

I.

Appellant was served with two grand jury subpoenas. One was directed to her in her personal capacity, and the other was directed to the custodian of records for a corporation of which she is the sole officer and director. Appellant filed a motion to quash the latter subpoena. In that motion, she stated that she did not have the specified records in her possession and that if she were questioned before the grand jury as to their location, she would invoke her Fifth Amendment right not to incriminate herself. When appellant was called before the grand jury, she testified that she did not have the records, and then, when asked where the records sought in the subpoena were located, she refused to answer.

After a hearing, the district court denied appellant’s motion to quash the subpoena and ordered her to testify. When appellant refused to comply, the court held her in civil contempt and ordered her detention until she complied with the court’s order or until the expiration of the grand jury’s term. The order of contempt was entered on May 10, 1996. The district court stayed its contempt order until July 1, 1996, in order to allow this court to hear an appeal.¹

II.

¹ The issue before us is whether a custodian of corporate records who is not in possession of the records may be compelled to testify regarding their location. We conclude that she may not.

The Fifth Amendment protects an individual from being compelled to provide testimony that might be self-incriminating. U.S. Const. amend. V. Testimony is not limited to oral declarations, but may include, inter alia, the production of documents. E.g., United States v. Doe, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984); Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). In Fisher, the Court recognized that “[t]he act of producing evidence in response to a subpoena ... has communicative aspects of its own ....” 425 U.S. at 410, 96 S.Ct. at 1581. The production of documents conveys the fact that the documents exist, that they were in the possession of the witness, and that they were the documents subject to the subpoena. Id. Where these communicative acts of production have “testimonial” value and incriminate the witness, the Fifth Amendment privilege may be invoked. Doe, 465 U.S. at 617, 104 S.Ct. at 1244 (holding that Fifth Amendment protects a sole proprietor from producing business records when the act of production itself constituted testimonial incrimination); Fisher, 425 U.S. at 410, 96 S.Ct. at 1581 (suggesting that where an act of production is testimonial the Fifth Amendment is applicable, but holding that the act of production was not privileged because the existence of the documents in that case was “a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government’s information by conceding that he in fact has the papers”).

Although the Fifth Amendment protects individuals from compelled, incriminating testimony, it does not do the same for corporations; an agent of a “collective entity” may not refuse to produce documents even when those documents will incriminate that entity. Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906) (corporation has no Fifth Amendment privilege); United States v. White, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944)
(labor union unprotected by Fifth Amendment). Moreover, an agent of a corporation may not refuse to turn over corporate records even when the content of those records may incriminate the subpoenaed agent herself. *United States v. White*, 322 U.S. at 697, 64 S.Ct. at 1250 (custodian must produce labor union’s documents where contents incriminate custodian); *Wilson v. United States*, 221 U.S. 361, 384, 31 S.Ct. 538, 546, 55 L.Ed. 771 (1911) (custodian must produce corporate documents even where contents are self-incriminating). Denying agents immunity is justified by the fact that an agent is not compelled to prepare the documents over which she had temporary control, nor is there a necessary relation between the person producing the documents and the documents themselves. See *Braswell v. United States*, 487 U.S. 99, 123, 108 S.Ct. 2284, 2298, 101 L.Ed.2d 98 (1988) (Kennedy, J., dissenting). Although it has long been clear that a custodian of corporate records may not claim a Fifth Amendment privilege to avoid producing documents even though the contents of the documents would incriminate her, it was unclear until recently whether that privilege applied when the act of production itself constituted self-incriminating testimony.

In *Braswell v. United States*, the Supreme Court answered this question, holding that a custodian of corporate records must comply with a subpoena ordering the production of those records even when the act of production constitutes testimonial self-incrimination. 487 U.S. at 121, 108 S.Ct. at 2296. The Court held that the “collective entity” doctrine prohibited the agent’s reliance on the Fifth Amendment when called upon to produce documents belonging to the principal.

In reaching this conclusion, the Court relied on the “agency rationale undergirding the collective entity decisions.” *Braswell*, 487 U.S. at 109, 108 S.Ct. at 2291. The Court stated that a custodian of records acts in a representative capacity and not a personal capacity. *Id.* As an agent of the corporation, the custodian is bound by the *1201* same obligation to produce records that belongs to the corporation itself. *Id.* “[T]he custodian’s act of production is not deemed a personal act, but rather an act of the corporation,” irrespective of whether the agent’s act is testimonial and incriminating. *Id.*

The *Braswell* Court distinguished *Curcio v. United States*, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957), which reversed a contempt citation that was issued to the secretary-treasurer of a union who refused to answer questions pertaining to the whereabouts of union records. In *Curcio*, the Court rejected the government’s argument “that the representative duty which required the production of union records in the White case requires the giving of oral testimony by the custodian....” *Id.* at 122, 77 S.Ct. at 1149. The Court explained that

forcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment.

*Id.* at 126-28, 77 S.Ct. at 1151-52. The difference between *Curcio* and *Braswell*, according to the Court, is that “with respect to a custodian of a collective entity’s records, the line drawn was between oral testimony and other forms of incrimination.” *Braswell*, 487 U.S. at 113, 108 S.Ct. at 2293.

In drawing a line between acts of production and oral testimony, the Court appears to have relied on one fact that distinguishes these two types of testimony: the corporation owns the documents. In contrast, to the extent that one’s thoughts and statements can be said to “belong” to anyone, they belong to the witness herself. A custodian has no personal right to retain corporate books. Because the documents belong to the corporation, the state may exercise its right to review the records. *Wilson*, 221 U.S. at 384, 31 S.Ct. at 546 (The State’s “visoriorial power which exists with respect to the corporation of necessity reaches the corporate books, without regard to the conduct of the custodian.”) (quoted in *Braswell*, 487 U.S. at 106, 108 S.Ct. at 2289). For Fifth Amendment analysis, oral statements are different. The government has no right to compel a person to speak the contents of her mind when doing so would incriminate that person; to do so would be “contrary to the spirit and letter of the Fifth Amendment.” *Curcio*, 354 U.S. at 126-28, 77 S.Ct. at 1151-52.

Appellant in this case is not refusing to produce corporate documents; she claims not to possess them. As in *Curcio*, she is refusing to provide oral testimony regarding the location of the documents. *Curcio* appears, therefore, to be on all fours with this case. Nevertheless, the government argues, and the district court held, that *Curcio* does not apply.
The district court distinguished Curcio on the ground that the witness in that case was called before the grand jury pursuant to a personal subpoena and not in his capacity as the records custodian, noting that the Court made clear that “[t]his conviction related solely to petitioner’s failure to answer questions asked pursuant to the personal subpoena ad testificandum.” Curcio, 354 U.S. at 121, 77 S.Ct. at 1148. The reason for this language, however, was not to limit the analysis only to personal subpoenas, but merely to indicate that the Court was not addressing Curcio’s obligation “to produce the books and records demanded in the subpoena duces tecum.” Id. (first emphasis added).

Had the Court intended to rely on the distinction between types of subpoenas, it would have been unnecessary to analyze Curcio’s rights under the Fifth Amendment; rather, the Court could simply have held that the Fifth Amendment bars the production of testimonial evidence under a personal subpoena. Furthermore, were Curcio limited to personal subpoenas, the Court would not have found it necessary to consider that case in Braswell, where the witness was served in his capacity as president of a corporation and the subpoena did not require his testimony. *1202 487 U.S. at 101, 108 S.Ct. at 2286. We see no basis, therefore, for distinguishing Curcio on the ground that Curcio involved a personal subpoena.

The line drawn between the act of production and oral testimony may be a purely formal one, but it is the line that the Supreme Court has drawn. The refusal to provide testimony pertaining to the location of documents not in appellant’s possession falls squarely on the side of the line that the Supreme Court has held is subject to Fifth Amendment protection. Absent an adequate grant of immunity, the appellant may not be compelled to testify as to the location of documents not in her possession when that testimony would be self-incriminating.3

III.

[6] The government next argues that by stating to the grand jury that she did not possess the records, the witness has waived her Fifth Amendment privilege. Rogers v. United States, 340 U.S. 367, 373, 71 S.Ct. 438, 442, 95 L.Ed. 344 (1951). We disagree. Because a custodian of corporate records is required to produce corporate documents sought pursuant to a subpoena, her statement at an enforcement hearing that she is not in possession of those documents does not constitute a waiver of her Fifth Amendment rights.

The case before us is distinguishable from United States v. Hankins, 565 F.2d 1344 (5th Cir.), clarified, 581 F.2d 431 (5th Cir.1978), cert. denied, 440 U.S. 909, 99 S.Ct. 1218, 59 L.Ed.2d 457 (1979), where the former Fifth Circuit refused to permit a defendant at a contempt hearing to invoke his Fifth Amendment right not to testify about the present location of documents that he had been previously ordered to produce.4

Hankins had refused to turn over partnership records to the IRS on the ground that the records themselves would incriminate *1203 him. 565 F.2d at 1348. The district court properly rejected this claim and ordered the records produced. Id. at 1351. When all the documents were not produced, upon petition by the government, the court issued an order to show cause why Hankins should not be held in contempt. Id. Because Hankins failed to produce evidence that he could not comply with the enforcement order, he was held in contempt.

On appeal, “Hankins argue[d] that the District Court erred in holding him in contempt because he had informed the Court at the enforcement hearing ... that he did not have all the records summoned by the government.” Id. (emphasis added). The Fifth Circuit found this contention “totally devoid of merit. No evidence on inability to produce was presented by Hankins during the enforcement hearing in response to the government’s evidence that the books and records were in his hands.” Id. In fact, the district court explicitly had found that Hankins had “acknowledged to the Court that he had in his possession, in whatever capacity, the summoned records.” Id. at 1351 n. 3.

In a clarifying opinion, the Fifth Circuit explained that it would not permit Hankins to relitigate the district court’s earlier finding that he had possessed the records at the time the court ordered the summons enforced. 581 F.2d at 437 n. 8. (citing Maggio v. Zeitz, 333 U.S. 56, 69, 68 S.Ct. 401, 408, 92 L.Ed. 476 (1948)). Had Hankins “appeared before the Internal Revenue Agent as ordered by the District Court and testified under oath” that he did not possess all the documents, the burden would not have shifted to Hankins to prove that he never had the documents. 565 F.2d at 1352 (distinguishing United States v. Silvio, 333 F.Supp. 264 (W.D.Mo.1971)). The issue before the court at the
contempt hearing was only Hankins’s present inability to comply.

In a subsequent habeas proceeding, *Hankins v. Civiletti*, 614 F.2d 953 (5th Cir.1980), Hankins submitted affidavits attesting to his inability to comply with the summons when initially served and at any time thereafter. *Id.* at 954. The district judge rejected this proffer as insufficient to purge Hankins of his contempt or to comply with earlier mandates of the court. *Id.* Hankins then took the stand and testified that he had complied to the best of his ability. Upon cross-examination, he refused on Fifth Amendment grounds to explain what he knew about the missing papers. On appeal, the court held that Hankins’s testimony on direct examination constituted a waiver “of his Fifth Amendment privilege with regard to matters relevant to his direct testimony.” *Id.* at 955.

In contrast to the present case, *Hankins* involved an attempt to relitigate an issue during a contempt hearing that was *never* raised at the initial enforcement hearing. Because the defendant failed to raise the claim of inability to produce records at the time the summons was enforced, the burden shifted to the defendant to prove a present inability to comply at the time of the contempt hearing, even when doing so would result in self-incrimination. See *United States v. Rylander*, 460 U.S. at 759, 103 S.Ct. at 1554, discussed *supra* at n. 3. Once Hankins testified at the contempt hearing that he was unable presently to comply, however, the government was entitled to cross-examine him. Accordingly, his testimony on direct examination constituted a waiver of his Fifth Amendment privilege with regard to that testimony.

In this case, unlike *Hankins*, appellant raised her claim of inability to comply at the time of the enforcement proceeding. Had appellant been in possession of the records, she would have been required to turn them over pursuant to the subpoena duces tecum. See *Braswell*, 487 U.S. 99, 108 S.Ct. 2284. Had she remained silent at the enforcement proceeding, the inference would have been that she was refusing to comply with the order to produce corporate records; it would not have been that she was unwilling to state that she did not possess them. This is precisely what happened to Hankins. See *United States v. Meeks*, 642 F.2d 733, 735 (5th Cir. Unit A April 1981) (“Hankins never made clear that his claim of privilege was directed solely against explaining what role he might have played in the fact that records were no longer available rather than a general claim that the records within themselves *might* incriminate him.”), *vacated*, 461 U.S. 912, 103 S.Ct. 1889, 77 L.Ed.2d 280 (1983).

Thus, for the Court to treat appellant’s statement as a waiver would create an intolerable result, placing appellant in the position of remaining silent and being held in contempt for failing to produce the records that she did not have, or saying that she did not have the records and then being ordered to testify. In other words, the appellant would have had to choose between testifying and being held in contempt. Her Fifth Amendment right would have slipped between the cracks. We hold, therefore, that appellant did not waive her rights under the Fifth Amendment.

[7][8] The government also relies on *Rogers* to argue that any statement appellant might have made concerning possession of the records would not be self-incriminating. When a witness invokes a claim of privilege, there must be a “substantial and ‘real’ fear” of self-incrimination. *Marchetti v. United States*, 390 U.S. 39, 52, 88 S.Ct. 697, 705, 19 L.Ed.2d 889 (1968); *United States v. Cuthel*, 903 F.2d 1381, 1384 (11th Cir.1990) (“A witness may properly invoke the privilege when he ‘reasonably apprehends a risk of self-incrimination ....’ ”) (quoting *In re Corrugated Container Anti-Trust Litigation*, 620 F.2d 1086, 1091 (5th Cir.1980)). In *Rogers*, the witness refused to testify out of a desire to protect the person who possessed the records. 340 U.S. at 368, 71 S.Ct. at 439. After considering what information the testimony would reveal about the witness, the Court determined that on the facts of that case it would not have been incriminating. *Id.* Whether testimony is self-incriminating is, however, a factual question. *Doe*, 465 U.S. at 614, 104 S.Ct. at 1243. Thus, we leave to the district court the question of whether testimony by the appellant as to who possessed the records sought by the subpoena would constitute incriminating evidence.

IV.

The district court’s order of contempt is REVERSED. This case is REMANDED to the district court for a determination of whether appellant has demonstrated a substantial risk of self-incrimination.