

Production Immunity

Although the concept of production immunity is relatively new, in 1886 the United States Supreme Court held that the compulsory production of private papers containing incriminating information violated the Fifth Amendment to the United States Constitution. The Court has since found that as long as the subpoenaed papers were prepared voluntarily, the documents themselves cannot be said to contain compelled testimonial evidence. The documents therefore may not always be withheld on Fifth Amendment grounds.

The act of producing documents in response to a subpoena constitutes a communicative act on its own. The act of production shows that:

- The documents exist.
- The documents are believed to be authentic.
- The documents are in the possession of the witness required to produce them.

Generally, the witness is not permitted to refuse to produce documents if the state or federal government is able to demonstrate with reasonable particularity that it knows of the existence and location of subpoenaed documents.

The Fifth Amendment prohibits an inquisition on the assembly, sorting and production of voluminous documents in response to a broad subpoena request. The subpoena request for producing documents should be precise and specific. It should identify as closely as possible the documents sought to be produced. The subpoena should not ask for every document in a witness's or defendant's possession.

Production of Corporate Documents

With respect to the production of corporate documents the above principles are inapplicable. Corporations are not protected by the Fifth Amendment privilege against self-incrimination. Corporations are not entitled to assert the Fifth Amendment privilege with respect to the contents of subpoenaed records. The custodian of corporate records is not entitled to refuse to produce those records on the ground that their contents may incriminate him or her on a personal level because they are not his or her records. Moreover, the custodian of the records may not claim that the actual act of producing the records violated his or her right against self-incrimination.