Can a Prosecutor Make You Cough Up Your Offshore Account?

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In this article, the authors explore the constitutional validity of consent decrees in cases involving foreign bank account information and suggest that in some circumstances, one possible approach might be to decline to sign such a release.

As the IRS and the Justice Department continue their war against offshore bank accounts, more cases are filtering into the courts. Although the authorities often have a rock-solid evidentiary case on tax fraud, conspiracy, or charges based on a violation of the Bank Secrecy Act, there are times when key evidentiary building blocks are missing. That is particularly the case in situations in which the government's investigation was triggered or at least largely supported by informant data or surreptitiously gathered information. The government may not have an admissible bank statement showing the taxpayer's ownership. And when it does, there may be evidentiary weaknesses in linking that statement to the taxpayer (such as when ownership in a trust or corporation must be shown). In those circumstances, the government may not be able to prove its case unilaterally, and it needs help from the foreign financial institution.

That may not be much of a hurdle for the government in some cases. Faced with certain corporate death, UBS spilled the beans on many of its non-disclosed U.S. clients and offered full cooperation to help the U.S. authorities prove their case. Rumors are now swirling that Credit Suisse may have thrown its non-disclosed U.S. clients under the proverbial bus as well.[1] However, there will be situations in which the U.S. authorities do not have that sort of leverage over the foreign financial institution.[2] In those situations, the DOJ can be expected to pull an old favorite out of its box of tricks — the "consent decree," when prosecutors force targets to implicate themselves by consent — to authorize the government to collect the information it needs from the foreign bank. This article explores the developments in the law since consent decrees were last in heavy use by the DOJ (back in the big-hair days of the 1980s — yes, tax evasion will always be with us) to see if consent decrees have lost some of their luster since that time.

The DOJ can be expected to rely mostly on *United States v. Payner*,[3] in which the defendant was charged with falsely denying ownership of a bank account in the Bahamas. The government's information about the account was acquired as part of a scheme devised by law enforcement officials to steal bank records from the briefcase of a Bahamian bank official traveling in the United States. The district court granted the defendant's motion to suppress the bank records based on an unlawful search and seizure, but the U.S. Supreme Court reversed. According to the Court, the defendant lacked standing to challenge the government's theft of the records because a bank customer had no legitimate expectation of privacy regarding the records. In reaching that conclusion, the Court rejected any suggestion that Bahamian law had created an expectation of privacy, partly because it was not clear that any of the information obtained would have been secret under Bahamian law. The Court continued, in what

[1]Reuters, "4 Credit Suisse Bankers Indicted in U.S. Tax Probe," Feb. 23, 2011 (spokesperson for Credit Suisse says bank is cooperating with the investigation), *available at* http://in.reuters.com/article/2011/02/23/usa-creditsuisse-taxes-idINN2316980420110223.

(Footnote continued in next column.)

[2]Even under the Foreign Account Tax Compliance Act of 2009 (enacted as part of the Hiring Incentives to Restore Employment Act, P.L. 111-147) that will soon go into effect, the U.S. authorities require the foreign financial institution to agree to provide the relevant information in exchange for favorable treatment. Some smaller institutions may not need the U.S. capital markets badly enough to make that trade. George Clarke, "FATCA: The End of American Exceptionalism or Merely the Next Chapter?" *Forbes*, IRS Watch and Tax Procedure Blog (Jan. 12, 2011), *available at* http://blogs.forbes.com/irswatch/2011/01/12/fatca-the-end-of-american-exceptionalism-or-merely-the-next-chapter (last visited Mar. 2, 2011).

[3]447 U.S. 727 (1980).

is probably dicta, to reject any expectation of privacy on the grounds that American law required the reporting of foreign bank accounts.

The second case in the government's arsenal is *Doe v. United States*.[4] The question before the Court was whether a court order compelling the target of a grand jury investigation to authorize foreign banks to disclose records of his accounts, without formally identifying those documents or acknowledging their existence, violated the target's Fifth Amendment privilege against self-incrimination. The Court held that the order did not violate the Fifth Amendment, concluding that there was no testimonial significance to the district court's order because "neither the form nor its execution communicates any factual assertions, implicit or explicit, or conveys any information to the Government."[5]

The Court made clear, however, that the holding was limited to the Fifth Amendment privilege alone, explaining that "it should be remembered that there are many restrictions on the government's prosecutorial practices in addition to the self-incrimination clause. Indeed, there are other protections against governmental efforts to compel an unwilling suspect to cooperate in an investigation, including efforts to obtain information from him. We are confident that these provisions, together with the self-incrimination clause, will continue to prevent abusive investigative techniques."[6]

Do *Payner* and *Doe* validate prosecutors' attempts to compel targets to execute "consent" forms releasing any privacy protections in their foreign bank records? Several points are worth considering in answering that question. First, it is important to understand that the "reasonable expectation of privacy" analysis in *Payner* relies specifically on the unique features of the Bahamian bank law at issue in that case. As the Court observed, the Bahamian law provided weak privacy protections, and therefore the Fourth Amendment analysis was no different there than it was in connection with American bank records.[7] But would the outcome be the same in a jurisdiction with stronger bank privacy protections, such as Switzerland? The Court's analysis in *Payner* suggests it would not. To be sure, the Court suggested that American laws requiring the reporting of relationships with foreign banks might separately defeat any privacy expectations,[8] but it is difficult to understand that statement in the Fourth Amendment context. American laws criminalize possession of narcotics and many types of weapons, but in drug and gun cases, the Fourth Amendment analysis has never proceeded from the tautology that "there is no reasonable expectation of privacy when engaging in activity that the law deems criminal." In that case, the Fourth Amendment would be useful only when one didn't need it. Virtually every Fourth Amendment claim in the criminal context involves a situation in which a defendant is asserting a reasonable expectation of privacy while engaging in criminal conduct, and yet courts often validate those claims. It is therefore hard to understand why a completely different Fourth Amendment analysis would apply to foreign banking.

Second, *Doe*'s approval of compelled releases in connection with foreign banking records is carefully limited to the self-incrimination clause of the Fifth Amendment and the narrow situation in which a Court order had already been obtained. As the Court emphasized, "there are other protections against governmental efforts to compel an unwilling suspect to cooperate in an investigation, including efforts to obtain information from him."[9] Those protections include, most importantly, the Fourth Amendment prohibition on unreasonable searches and seizures. Had there been a Fourth Amendment challenge in *Doe*, which there was not, it is possible that the coerced release forms would be insufficient to establish consent within the meaning of the Fourth Amendment. As the Supreme Court has made clear, and as *Doe* itself highlighted,[10] to establish consent was given to a search or seizure, the government must show that any expression of consent was voluntary: "If under all the circumstances it has appeared that the consent was not given voluntarily — that it was coerced by threats or force, or granted only in submission to a claim of lawful authority — then we have found the consent invalid and the search unreasonable."[11] A compelled "consent" decree demanded by prosecutors and purportedly condoned by the courts should not satisfy that requirement.

Third, even if *Payner* and *Doe* might have justified compelled consent decrees when the Court decided those cases, the law has evolved considerably in the years since. In the last 10 years, the Court's Fourth Amendment jurisprudence has become more sensitive to privacy interests, even in materials possessed by third parties; accordingly, the lower courts have followed suit. In cases like

[4] 487 U.S. 201 (1988).
[5] *Doe*, 487 U.S. at 215.
[6] *Id.* at 214.
[7] *Payner*, 447 U.S. at 732 n.4.
[8] *Id.* ("Moreover, American depositors know that their own country requires them to report relationships with foreign financial institutions.")
[9] *Doe*, 487 U.S. at 214.
[10] *Id.* at 214 and n.13.
[11] *Schneckloth v. Bustamonte*, 412 U.S. 218, 233-234 (1973).

Ferguson v. City of Charleston[12] and *City of Ontario v. Quon*,[13] the Court had facts before it that could have been addressed using the formalistic analysis of *Payner*: The disputed materials were in the possession of third parties (medical records in *Ferguson* and workplace text messages in *Quon*), and therefore the individual before the Court had no expectation of privacy regarding them. Instead, the Court conducted an expectation-of-privacy analysis that was more sensitive to the real interests at stake, based on a detailed examination of the privacy interests jeopardized by the search.[14] Even under the same Bahamian bank scheme, it is far from clear that *Payner* would come out the same way today, and it is especially unclear whether the Court would find no reasonable expectation of privacy regarding banking records located in a different foreign jurisdiction with stronger privacy protections.

Fourth and finally, the Supreme Court's analysis of the Fifth Amendment privilege against self-incrimination shifted considerably in *United States v. Hubbell*.[15] *Hubbell* established a much stronger protection against document productions that carry some testimonial component than set forth in *Doe*. Indeed, commentators have noted the extreme tension between *Hubbell* and earlier cases, like *Doe*, that took an unreasonably narrow view of the communications made through acts like being forced to sign bank account releases.[16] *Hubbell* found that there was a Fifth Amendment violation in a response to a subpoena request, because the production communicated the existence and whereabouts of documents the government had not previously known existed. But signing the compelled release form in *Doe* seemed to carry similar import, as well as an implicit communication to the bank that the defendant ''consented'' to the release of his banking records. The *Doe* Court's refusal to find any testimonial content in this act, thus refusing even to read into the execution of the form the testimonial statement — ''I consent to the release of my bank records'' — seems irreconcilable with *Hubbell*'s much more Fifth-Amendment-sensitive analysis. Therefore, even the narrow Fifth Amendment issue resolved in *Doe* is potentially open to reexamination post-*Hubbell.*

In summary, an individual or company facing a government demand that they consent to the release of foreign bank account information need not necessarily acquiesce. The correct course of action will depend on many factors, but declining to sign the releases should be part of the discussion, as there may be a sound legal basis to resist the government's efforts. If the DOJ has no other mechanism to get the information, then declining to ''consent'' may effectively derail the prosecution.

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[12]532 U.S. 67 (2001).

[13]130 S. Ct. 2619 (2010).

[14]To be sure, in *Quon* the Court only *assumed* that a worker has a reasonable expectation of privacy of his workplace text messages but disposed of the case on different grounds. But the Court's discussion of the privacy interests at stake in *Quon* has already been relied on by the lower courts to find a reasonable expectation of privacy of e-mails held by third parties. *See*, *e.g.*, *United States v. Warshak*, Nos. 08-3997, 4085, 4087, 4212, 4429; 09-3176, 2010 U.S. App. LEXIS 25415 at *36, (6th Cir. 2010) (finding reasonable expectation of privacy exists for e-mails held by an Internet service provider, in part based on the Supreme Court's analysis in *Quon*, and rejecting the argument that no expectation of privacy exists for records held by third parties).

[15]530 U.S. 27 (2000).

[16]*See*, *e.g.*, Robert P. Mosteller, ''Cowboy Prosecutors and Subpoenas for Incriminating Evidence: The Consequences and Correction of Excess,'' 58 *Wash. & Lee L. Rev*. 487 (2001).