Spring 2002

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Recommended Citation

Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents after United States v. Hubbel - New Protection for Private Papers*, 29 *Am. J. Crim. L.* 123 (2002).

AMERICAN JOURNAL OF CRIMINAL LAW

Published at The University of Texas School of Law

Volume 29 Spring 2002 Number 2

Articles

The Fifth Amendment and Compelled Production of Personal Documents After *United States v. Hubbell* –New Protection for Private Papers?

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Summary:

This Article addresses a long-unresolved issue in criminal and constitutional law: Does the Fifth Amendment provide any protection against compelled production of incriminating personal documents in the possession of an individual who is a subject or target of a criminal investigation? The Supreme Court has not definitively addressed this important question, and the case law reflects deep disagreement on an issue of great significance to criminal law enforcement. The issue has been unresolved since 1976, when the Supreme Court redefined the scope of the Fifth Amendment privilege against self-incrimination in Fisher v. United States *and held that the privilege does not bar compelled production of incriminating documents. This Article examines the development of the law up to and since* Fisher, *and concludes that the Supreme Court's 2000 decision in* United States v. Hubbell *has, at least in practical effect, diminished the impact of* Fisher *and restored Fifth Amendment protection to many private papers in the possession of individuals. This Article analyzes the likely impact of the* Hubbell

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The author gratefully acknowledges the research assistance of Michael Schechterly of The Dickinson School of Law Class of 2002 and Michael B. Tracey of The Dickinson School of Law Class of 2003.

decision on criminal law enforcement and concludes that after Hubbell *prosecutors in many cases may be more likely to use search warrants, rather than subpoenas, to obtain personal documents from individuals who are subjects or targets of an investigation—if, that is, they can satisfy the Fourth Amendment's particularity and probable cause requirements. If prosecutors cannot satisfy these Fourth Amendment requirements, then after* Hubbell *they no longer can be confident that they can compel the production of private papers by subpoena and immunity grant and subsequently use the contents of those papers to prosecute the individual who produced them. These changes flow directly from the* Hubbell *decision, and they represent a major "power shift" from prosecutors to defense counsel in white collar criminal investigations and prosecutions.*

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I. Introduction

In 1976, the United States Supreme Court dropped a bombshell[1] on the constitutional privilege against self-incrimination with its decision

1 "Bombshell" is a strong word, but it does not overstate the significance of the *Fisher* decision. Professor Mosteller has said, "The Fisher decision represented a major watershed, signaling a fundamental departure from earlier fifth amendment doctrines." Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 3 (1987); *see also* Mitchell Lewis Rothman, *Life After* Doe*? Self-Incrimination and Business Documents*, 56 U. CIN. L. REV. 387, 387 (1987); Stan Krauss, Note, *The Life and Times of* Boyd v. United States *(1886-1976)*, 76 MICH. L. REV. 184, 206-07 (1977); Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, 95 HARV. L. REV. 683, 694-702 (1982). The Supreme Court itself subsequently acknowledged that "the holding in *Fisher* . . . embarked upon a new course of Fifth Amendment analysis." Braswell v. United States, 487 U.S. 99, 109 (1988). The principal question posed by this Article is whether that "new course" has been circular, ultimately bringing Fifth Amendment law back to a position very near pre-*Fisher* principles. After *United States v. Hubbell*, it appears that in significant respects the Court's course has indeed been circular and Fisher's impact has been largely nullified, at least when an individual's private

in *Fisher v. United States*.[2] *Fisher* held that the Fifth Amendment privilege against self-incrimination is not a bar to the compelled production of incriminating documents—and, therefore, an individual[3] can be forced to produce incriminating private papers—because the prior, voluntary creation of the documents "was not 'compelled' within the meaning of the privilege."[4] This holding came to be understood as having effectively eliminated Fifth Amendment protection for the contents[5] of previously created documents, arguably even the most private or most incriminating personal documents, such as a diary or a personal journal.[6]

Over the past twenty-five years, the holding of *Fisher* has been construed more and more broadly,[7] to the point that the conventional

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papers are sought by the government and the government does not have prior knowledge of the existence, location, and authenticity of those papers.

2 425 U.S. 391 (1976).

3 The Supreme Court treats corporations and other collective entities, such as partnerships, differently from individuals under the Fifth Amendment, applying the "collective entity" rule. *See, e.g.*, Bellis v. United States, 417 U.S. 85 (1974) (partnerships); United States v. White, 322 U.S. 694 (1944) (labor unions); Hale v. Henkel, 201 U.S. 43 (1906) (corporations). *See generally* Mosteller, *supra* note 1, at 49-86 (analyzing "the artificial entities exception" to the Fifth Amendment). The development of the collective entity doctrine is described at *infra* Part II.A.2.

4 *See* United States v. Hubbell, 530 U.S. 27, 35-36 (2000) (referring to *Fisher*, 425 U.S. at 414).

5 As explained by the *Fisher* Court and discussed in more detail below, the information contained in the documents must be distinguished from the information that may be conveyed by the act of producing the documents. *See Fisher*, 425 U.S. at 410 ("The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena."); *see also* Baltimore City Dep't. of Social Servs. v. Bouknight, 493 U.S. 549, 555 (1990) ("The Fifth Amendment's protection may nonetheless be implicated because the act of complying with the government's demand testifies to the existence, possession, or authenticity of the things produced."); *In re* Hyde, 235 B.R. 539, 543 (S.D.N.Y. 1999) ("Even if the contents of documents are not privileged, however, the act of producing those documents might be."); Barbara Daniels Davis, Note, *The Fifth Amendment and Production of Documents after* United States v. Doe, 66 B.U.L. REV. 95, 114 (1986); Christopher M. Marston et al., *Procedural Issues*, 37 AM. CRIM. L. REV. 819, 829 (2000). For further discussion of this point, see *infra* Part II.B.

6 *See* United States v. Doe, 465 U.S. 605, 618 (1984) (Marshall, J. and Brennan, J., concurring in part and dissenting in part) [hereinafter *Doe I*]; *In re* Grand Jury Subpoena Duces Tecum Dated October 29, 1992, 1 F.3d 87, 91-93 (2d Cir. 1993); *In re* Steinberg, 837 F.2d 527, 528-29 (1st Cir. 1988); United States v. Katin, 109 F.R.D. 406, 407-08 (Mass. 1986). As one commentator has observed, "The reasoning of [*Fisher* and *Doe I*] suggests that this rule applies even to private documents such as diaries and correspondence, thereby largely burying the notion that the fifth amendment protects against compelled intrusion into individuals' thoughts and views." William J. Stuntz, *Self-incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1277 (1988); *see also* Daniel E. Will, Note, *"Dear Diary-Can you be used against me?": The Fifth Amendment and Diaries*, 35 B.C. L. REV. 965 (1994) (describing the judicially compelled production of Senator Bob Packwood's personal diaries to the Senate Select Committee on Ethics).

7 *See* United States v. Schlansky, 709 F.2d 1079, 1082 (6th Cir. 1983); Richard A. Nagareda, *Compulsion "to be a witness" and the Resurrection of* Boyd, 74 N.Y.U. L. REV. 1575 (1999); David S. Rudolf & Thomas K. Maher, *Behind Closed Doors: Hubbell's Ongoing Saga: Metaphysics of the Fifth Amendment—Independent Counsel's Jurisdiction*, THE CHAMPION, April 1999, at 44.

wisdom in white collar criminal investigations is that most documents are not within the protections of the Fifth Amendment privilege against self-incrimination.[8] Documents are routinely produced to grand juries by individuals who are subjects or targets of the grand jury's investigation in response to subpoenas duces tecum[9] without any assertion of Fifth Amendment privilege—whether as to the contents of the documents or the act of producing the documents.[10] This is particularly true with regard to individuals' business and financial records, which often are not perceived as being sufficiently private or personal to implicate Fifth Amendment protection.[11] Throughout the post-*Fisher* period, however, one critical question has remained unanswered: Are there any documents that are so private, so personal, that the Fifth Amendment would shield them from compelled production?[12]

This difficult question provoked a confrontation between Justice O'Connor, on the one hand, and Justices Marshall and Brennan, on the other hand, in dueling concurring opinions in *United States v. Doe*,[13] the 1984 decision that "reexamined and reaffirmed *Fisher*'s new approach"[14] to Fifth Amendment jurisprudence. In her *Doe* concurring opinion Justice O'Connor took the firm position that "the Fifth Amendment provides absolutely no protection for the contents of private papers of any

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8 *See* Mosteller, *supra* note 1, at 2 (noting that "the modern view [is] that the fifth amendment provides only limited protection for documents"); *see also* Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 49 (1986) ("On the whole, *Fisher* conveys the impression that even without immunity the act of production generally would not block access to the unprivileged contents of preexisting documents."); *cf.* Stuntz, *supra* note 6, at 1233 n.13 ("Nothing in the Court's analysis in those cases [*Fisher* and *Doe*] leaves room for any fifth amendment protection for the substance of private documents."). *Compare* SARA S. BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6:15, at 6-113 (2d ed. 1997 & Supp. 2000) ("[A] subpoena for a sole proprietor's bank account records can hardly raise serious questions about the existence of the records and the sole proprietor's possession of them.").

9 A subpoena duces tecum requires "the person to whom it is directed to produce the books, papers, documents or other objects designated therein." FED. R. CRIM. P. 17 (c).

10 *See supra* note 5; *see also* AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, CRIMINAL ANTITRUST LITIGATION MANUAL 95 (1983) (observing that most document subpoenas are not contested and of those that are, most are resolved by negotiations with the prosecution).

11 *See* United States v. Fishman, 726 F.2d 125, 126-27 (4th Cir. 1983); Robert Johnston et al., *Procedural Issues*, 36 AM. CRIM. L. REV. 983 (1999); Arthur Y.D. Ong, *Fifth Amendment Privilege and Compelled Production of Corporate Papers After* Fisher *and* Doe, 54 FORDHAM L. REV. 935 (1986); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).

12 *See, e.g.*, Alito, *supra* note 8, at 39 ("Certain intimate personal documents—a diary is the best example—are like an extension of the individual's mind. . . . Forcing an individual to give up possession of these intimate writings may be psychologically comparable to prying words from his lips.") (citing Fisher v. United States, 425 U.S. 391, 420 (1976) (Brennan, J., concurring). For an elaboration of this point, see Craig M. Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461 (1981). *Compare* Robert S. Gerstein, *The Demise of* Boyd*: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343, 361 (1979)).

13 United States v. Doe, 465 U.S. 605, 618-619 (1984) (O'Connor, J. concurring and Marshall, J., joined by Brennan, J., concurring in part and dissenting in part) [hereinafter *Doe I*].

14 Alito, *supra* note 8, at 29.

kind."[15] This statement drew a strong protest from Justices Marshall and Brennan, who argued that *Doe* did not support Justice O'Connor's broad conclusion, in part because the case involved "business records which implicate a lesser degree of concern for privacy interests than, for example, personal diaries."[16] No other member of the Court joined Justice O'Connor's opinion, but since *Doe*, most of the federal courts of appeals have followed her lead and concluded that the Fifth Amendment does not protect the contents of private papers.[17]

In the post-*Fisher* era, another truism concerning the compelled production of documents has come to be widely accepted by both prosecutors and criminal defense lawyers. In grand jury investigations of white-collar crime, prosecutors rely heavily on grand jury subpoenas duces tecum as their primary means of obtaining documentary evidence.[18] Subpoenas are used much more frequently than search warrants, which generally are used only when prosecutors fear destruction of documents if a subpoena is used or have reason to believe that a subpoenaed party will not comply fully with a subpoena.[19] Absent such circumstances, prosecutors prefer subpoenas to search warrants, and for good reason. In the federal system, subpoenas can be issued by prosecutors without judicial review or approval,[20] and grand jury subpoenas for documents need not satisfy the Fourth Amendment particularity and probable cause

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15 *Doe I*, 465 U.S. at 618.

16 *Id.* at 619.

17 *See* Barrett v. Acevedo, 169 F.3d 1155, 1168 (8th Cir. 1999); *In re* Grand Jury Subpoena Duces Tecum, 1 F.3d 87, 93 (2d. Cir. 1993); United States v. Wujkowski, 929 F.2d 981, 983, 985 (4th Cir. 1991) (contents of appointment books and records relating to vacation home not privileged under Fifth Amendment); *In re* Sealed Case, 877 F.2d 83, 84 (D.C. Cir. 1989) (privilege "does not cover the contents of any voluntarily prepared records, including personal ones"); *In re* Grand Jury Proceedings, 759 F.2d 1418, 1419 (9th Cir. 1985) (contents of business and personal documents are not privileged "in the absence of some showing that creation of the documents was the product of compulsion"). *But see In re* Grand Jury Proceedings, 55 F.3d 1012, 1013-14 (5th Cir. 1995); *In re* Grand Jury Proceedings, 632 F.2d 1033, 1043 (3d Cir. 1980) (both holding that the contents of personal papers remain privileged in certain circumstances).

18 *See, e.g.*, William J. Stuntz, *Commentary: O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 857 (2001) ("Like most white-collar criminal investigations, the inquiry into Clinton's misdeeds involved the heavy use of subpoenas, not searches."); *see also In re* Grand Jury Subpoena Dated April 9, 1996 (FGJ 96-02), 87 F.3d 1198 (11th Cir. 1996); Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions*, 15 GA. ST. U. L. REV. 601, 606 (1999); *cf.* United States v. Wuagneux, 683 F.2d 1343, 1349 (11th Cir. 1982) ("[E]ffective investigation of complex white-collar crimes may require the assembly of a 'paper puzzle' from a large number of seemingly innocuous pieces of individual evidence . . . [hence,] reading the warrant with practical flexibility entails an awareness of the difficulty of piecing together the 'paper puzzle.'").

19 *See* Citicasters v. McCaskill, 89 F.3d 1350, 1354-55 (8th Cir. 1996); *see also* Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 413-14 (1993).

20 *See* BEALE ET AL., *supra* note 8, § 6:2; *see also* Stern v. United States Dist. Court, 214 F.3d 4, 19 (1st Cir. 2000) (noting that prior judicial review is not required); Henning, *supra* note 19, at 413.

requirements that apply to search warrants.[21] This state of affairs has led to a general acceptance, by both prosecutors and defense lawyers, that it is easier for federal prosecutors to obtain documents by subpoena than by obtaining and executing a search warrant.[22]

Both of these assumptions—that the contents of pre-existing documents generally are not protected by the Fifth Amendment privilege against self-incrimination and that subpoenas are the easiest and best way for prosecutors to obtain documentary evidence—are widely accepted today. This Article takes the position that when private documents in the possession of an individual are sought by the government, neither of these assumptions necessarily remains valid after the Supreme Court's decision in *United States v. Hubbell*.[23] As explained below, the *Hubbell* decision effectively, if not explicitly, overruled *Fisher* in cases where prosecutors are seeking private documents from an individual. After *Hubbell*, prosecutors no longer can use a grand jury subpoena duces tecum and a grant of "act of production immunity" to compel production of documents by an individual who is a subject or target[24] of a grand jury investigation without risking the loss of their ability to prosecute that individual.

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21 *See* BEALE ET AL., *supra* note 8, § 6:20. *See generally* United States v. R. Enterprises, Inc., 498 U.S. 292, 301 (1991) (discussing the reasonableness requirement of subpoenas and holding that a court should strike down a subpoena only if "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation"); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208-09 (1946). The application of the Fourth Amendment to document subpoenas is discussed further at *infra* Part IV. A.

22 *See generally* Doe v. United States (*In re* Admin. Subpoena), 270 F.3d 413 (6th Cir. 2001); United States v. Bailey (*In re* Subpoena Duces Tecum), 228 F.3d 341, 347 (4th Cir. 2000); Gabriel L. Imperato, *Internal Investigations, Government Investigations, Whistleblower Concerns: Techniques to Protect Your Health Care Organization*, 51 ALA. L. REV. 205, 227 (1999); Nagareda, *supra* note 7, at 1631.

23 530 U.S. 27 (2000). Other commentators have recognized the potential significance of the *Hubbell* decision. Professor Stuntz has noted that the holding of *Fisher* "may have been largely (albeit tacitly) overruled by [*Hubbell*]." *See* Stuntz, *supra* note 18, at 859 n.65. Professor Uviller has gone further, concluding that *Hubbell* rejected the "correct" understanding of *Fisher* and "comes dangerously close" to restoring Fifth Amendment protection to the contents of voluntarily produced personal documents. *See* H. Richard Uviller, *Foreward: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook*, 91 J. CRIM. L. & CRIMINOLOGY 311, 335 (2001). This Article takes a different approach. It accepts the underlying premise that *Hubbell* is inconsistent with *Fisher*, but concludes that *Hubbell* was correctly decided and provides much-needed guidance in the application of the Fifth Amendment to document subpoenas. It goes on to analyze that guidance and explore its implications for the criminal justice system.

24 The Department of Justice United States Attorneys' Manual defines a "target" of a grand jury investigation as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant" and a "subject" of a grand jury investigation as "a person whose conduct is within the scope of the grand jury's investigation." USAM § 9-11.151 (1999).

Therefore, contrary to conventional wisdom, after *Hubbell*, prosecutors in many cases may be better off using search warrants to obtain personal documents from individuals who are subjects or targets of an investigation—if, that is, they can satisfy the Fourth Amendment's particularity[25] and probable cause[26] requirements. If prosecutors cannot satisfy these Fourth Amendment requirements, then after *Hubbell* they cannot use the contents of truly private, personal documents in a prosecution of the individual whom they compel to produce the documents. These changes flow directly from the *Hubbell* decision, and they represent a major "power shift" from prosecutors to defense counsel in white-collar criminal investigations and prosecutions. This Article analyzes each of these important consequences of the *Hubbell* decision.

Part I of this Article describes Fifth Amendment jurisprudence on compelled production of documents through the Supreme Court's decision in *Fisher v. United States* and its progeny. Part II discusses the impact of the *Hubbell* case on Fifth Amendment doctrine, analyzing the opinions of both the District of Columbia Court of Appeals and the Supreme Court. Part III compares grand jury subpoenas and search warrants as means of obtaining documentary evidence in the post-*Hubbell* era, discussing "act of production" immunity and the application of Fourth Amendment particularity and probable cause requirements to search and seizure of private documents. Part IV argues that, after *Hubbell*, prosecutors no longer can count on using "act of production" immunity to compel production of private documents from an individual and subsequently use those documents in a criminal prosecution of that individual. To obtain and lawfully use such documents in a criminal prosecution, the government must either (i) use a search warrant and comply with Fourth Amendment particularity and probable cause requirements, or (ii) be able to demonstrate that the prosecution possessed essentially the same level of knowledge about the documents in question—in other words, sufficient information to meet the Fouth Amendment particularity requirement—prior to granting immunity and compelling an individual to produce the documents. In its Conclusion, this Article asserts that *Hubbell* has, for practical purposes, overruled *Fisher* and restored full and meaningful (as

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25 *See generally* Maryland v. Garrison, 480 U.S. 79, 84 (1987); Caroline J. Hinga, *Twenty-Ninth Annual Review of Criminal Procedure: Introduction and Guide for Users: I. Investigation and Police Practices: The Warrant Requirement*, 88 GEO. L.J. 895, 900 (2000); David A. Kessler, *Illusion of Privacy: The Use and Abuse of Ex Parte Impoundment in Computer Software Copyright Cases*, 7 ALB. L.J. SCI. & TECH. 269, 285 (1997).

26 *See generally* Illinois v. Gates, 462 U.S. 213, 238 (1983); Chad R. Bowman, *Thirtieth Annual Review of Criminal Procedure: Introduction and Guide for Users: I. Investigation and Police Practices: The Warrant Requirement*, 89 GEO. L.J. 1068, 1068 (2001); Brett R. Hamm, United States v. Hotal*: Determining the Role of Conditions Precedent in the Constitutionality of Anticipatory Warrants*, 1999 BYU L. REV. 1005, 1012 (1999).

opposed to mere "physical act of production") Fifth Amendment protection to truly private documents that are in the possession of an individual who is the subject or target of a criminal investigation.

II. The Fifth Amendment, Compelled Production of Documents, and the Development of the Act of Production Doctrine.

A. *Fisher*'s Fifth Amendment Antecedents.

The privilege against self-incrimination is based upon the Fifth Amendment requirement that "no person . . . shall be compelled in any criminal case to be a witness against himself."[27] Although the Fifth Amendment was ratified in 1791, a defendant did not have the advantage of the full modern privilege against self-incrimination in federal cases until 1878.[28] Surprisingly, the United States Supreme Court did not address the self-incrimination clause of the Fifth Amendment until 1886 in *Boyd v. United States*.[29]

1. *Boyd v. United States* and its Aftermath

Boyd is the seminal case applying the Fifth Amendment to compelled production of documents and, as discussed below, much of what has followed *Boyd* has been written in response (or in opposition) to the holding in that case.[30] In *Boyd*, the United States initiated a forfeiture proceeding for thirty-five cases of plate glass that the government claimed

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27 U.S. CONST. amend. V.

28 A defendant was not permitted to offer sworn testimony in federal criminal trials until 1878. Act of March 16, 1878, ch. 37, 20 stat. 30 (codified at 18 U.S.C. § 3481 (2001)) (also does not allow presumption against defendant for failure to testify). *See also* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 891 n.153 (1995) ("Defendants were not *allowed* to testify under oath at trial in America until the midnineteenth century.") (emphasis in original) (citing Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91 (1892)); Nagareda, *supra* note 7, at 1616-17 (explaining that the common law rule of evidence disqualifying persons with an interest in the case being tried from providing testimony prevented a witness from testifying at his own criminal trial).

29 116 U.S. 616 (1886). Alito, *supra* note 8, at 39 ("*Boyd* was also the Supreme Court's first significant case involving the fourth amendment or the fifth amendment privilege.") (citation omitted). Professor Nagareda has identified dictum in an earlier case, *United States v. Reyburn*, 31 U.S. (6 Pet.) 352 (1832), as an antecedent to *Boyd*. *See* Nagareda, *supra* note 7, at 1584-85 (discussing the statement in *Reyburn* that a potential prosecution witness "could not have been compelled to produce the [document], and thereby furnish evidence against himself").

30 *See* Nagareda, *supra* note 7, at 1592-94 (discussing the Supreme Court's subsequent departure from the holding in *Boyd*); *see also* Krauss, *supra* note 1, at 4 (describing the erosion of *Boyd*).

had been imported by the Boyd firm without payment of customs duties.[31] At trial,[32] the government offered into evidence an invoice that the Boyd firm had been ordered by the court to produce.[33] The court's order was based on authority granted by a statute that treated a failure to produce the documents as a confession of the charges by the government.[34] Faced with this draconian penalty, the Boyd firm had complied with the court order under protest, claiming that this compelled production of documentary evidence was unconstitutional.[35]

The Supreme Court agreed, holding that the compulsory production of private business records[36] violated the Fifth Amendment.[37] The Court also held that the court order violated the Fourth Amendment because the compulsory production was the equivalent of an unreasonable[38] search and seizure.[39] Although the majority opinion in *Boyd* relied upon both the Fourth and Fifth Amendments in holding that the statute was unconstitutional,[40] Justice Miller's concurring opinion asserted that the Fifth Amendment alone was adequate grounds to strike down the statute.[41]

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31 *Boyd*, 116 U.S. at 617-19. For further explanations of the facts of Boyd, see Alito, *supra* note 8, at 31-35 (referencing the briefs filed in the case); Nagareda, *supra* note 7, at 1584-87 (emphasizing the *Boyd* Court's reliance on the legislative history of the statute authorizing the court order compelling production of the documents sought by the government); Mosteller, *supra* note 1, at 51; Rothman, *supra* note 1, at 184.

32 The jury entered a verdict against Boyd and the cases of glass were seized. *See Boyd*, 116 U.S. at 618.

33 Boyd objected to the validity of the order and to the constitutionality of the law prescribing the order. *Id.*

34 *Id.* at 620; *see also* Alito, *supra* note 8, at 31-32 (1986) (describing the history of the statute).

35 *Boyd*, 116 U.S. at 620; *see also* Krauss, *supra* note 1, at 184-85 ("The Boyds complied under protest, arguing that both the order and the statute authorizing it were unconstitutional.").

36 The Court did not distinguish Boyd's records as being business records; it simply characterized them as private papers and books. *Boyd*, 116 U.S. at 623-24, 632-34.

37 *See id.* at 634-35.

38 "'[U]nreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself . . . ." *Id.* at 633.

39 *Id.* at 634-35; *see also* Krauss, *supra* note 1, at 185 n.10.

40 This fact has received much criticism. *See, e.g.*, Alito, *supra* note 8, at 36; Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 682 (1968). Professor Nagareda has criticized Justice Bradley's majority opinion for "conflating the Fourth and Fifth Amendments." Nagareda, *supra* note 7, at 585. Another commentator has described "*Boyd*'s confusion of the Fourth and Fifth Amendments." Alito, *supra* note 8, at 35.

41 "[T]he order of the court under the statute is in effect a subpoena *duces tecum*, and, though the penalty for the witness's failure to appear in court with the criminating papers is not fine and imprisonment, it is one . . . of a criminal nature . . . . That this is within the protection which the Constitution intended against compelling a person to be a witness against himself, is, I think, quite clear." *Boyd*, 116 U.S. at 639 (Miller, J., concurring). Professor Nagareda has sought to "resurrect the Fifth Amendment holding of *Boyd*" by arguing that the Fifth Amendment protects against any compelled production of self-incriminatory evidence—testimonial, documentary, or physical. *See* Nagareda, *supra* note 7, at 1590. Two members of the United States Supreme Court have expressed their agreement with Professor Nagareda. *See* United States v. Hubbell, 530 U.S. 27, 49-56 (2000)

Boyd has been praised as standing for protection of private papers from government subpoena or seizure,[42] but its Fourth Amendment holding has been rejected as based on an ill-conceived property rights rationale.[43] A series of Supreme Court cases eroded *Boyd*'s constitutional holding to the point that one commentator pronounced *Boyd* "dead" after the Supreme Court's *Fisher* decision.[44] This judicial abandonment of *Boyd* has been analyzed elsewhere,[45] so the following discussion focuses on the line of decisions addressing the Fifth Amendment's application to the production of documents that culminated in the Court's landmark ruling in *Fisher*.

2. The Collective Entity Cases.

Boyd's conception of the Fifth Amendment as protecting against compelled production of potentially incriminating documents was weakened by a series of cases in which the Supreme Court analyzed document subpoenas directed to corporations and other collective entities. In *Hale v. Henkel*,[46] one of the questions before the Court[47] was whether a corporate official could refuse to produce *corporate* documents[48] called for by a subpoena duces tecum when the officer had been granted immunity from prosecution.[49] The Court held that if immunity has been granted to a corporate officer, then that individual can be compelled to testify and to comply with a subpoena for corporate documents,[50] because the right of an individual to assert the Fifth Amendment privilege against self-incrimination[51] only extends to the individual himself,[52] and a

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(Justice Thomas, joined by Justice Scalia, concurring). Professor Uviller has questioned whether other Justices will follow down a path that, in his view, would require overruling *Schmerber*. *See* Uviller, *supra* note 23, at 324.

42 *See, e.g.*, Alito, *supra* note 8, at 35-36.

43 *See id.*; *see also* Mosteller, *supra* note 1, 51-52 (analyzing *Boyd* as based on concerns for protection of private property rather than personal privacy); Nagareda, *supra* note 7, at 1587-89 (identifying shortcomings of the Court's Fourth Amendment Holding).

44 *See* Krauss, *supra* note 1, at 211.

45 *See, e.g., id.* at 185 n.10; Mosteller, *supra* note 1, at 51-59 (tracing the doctrinal development from *Boyd* to *Fisher*); Alito, *supra* note 8, at 35-41 (describing the "undermining" of *Boyd*); Robert Heidt, *The Fifth Amendment Privilege and Documents-Cutting* Fisher's *Tangled Line*, 49 MO. L. REV. 439, 444-70 (1984) (describing case law from *Boyd* to *Fisher*).

46 201 U.S. 43 (1906).

47 The Fourth Amendment aspects of *Hale v. Henkel* are discussed at *infra* Part III.A.

48 The case arose out of a grand jury investigation of corporate antitrust violations. *See Hale*, 201 U.S. at 64, 76-77.

49 *Id.* at 58.

50 *Id.* at 70.

51 The Court reasoned that the privilege against self-incrimination only applies to testimony that possibly exposes the witness to criminal charges, and it cannot be invoked if the testimony will only impair his reputation or disgrace him, if the testimony relates to past criminal acts for which the

corporation cannot assert the Fifth Amendment privilege against self-incrimination.[53] The Court based its conclusion that a corporation cannot assert a Fifth Amendment privilege against self-incrimination on the fact that a corporation "is a creature of the State" and, therefore, the State should be able to investigate whether the corporation exceeded the powers granted to it by the State.[54]

The Supreme Court built upon its *Hale* decision five years later when it decided *Wilson v. United States*.[55] In *Wilson*, a corporation was served with a subpoena duces tecum requiring production of corporate documents[56] in connection with a grand jury investigation[57] of officers[58] of the corporation for possible criminal offenses.[59] Wilson, who was the president of the corporation, refused to produce the subpoenaed corporate documents,[60] claiming that he was using them to prepare his defense and that their contents would tend to incriminate him.[61] The Court rejected Wilson's arguments[62] and held that a corporate officer cannot refuse to turn over corporate documents even if the inquiry of the grand jury that issued the subpoena is focused on the officer personally and not on the corporation.[63] The Court, relying upon its holding in *Hale* that a corporation has no privilege against self-incrimination,[64] stated that it would be an "unjustifiable extension" of personal rights to permit Wilson

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statute of limitations has run, or if the testimony relates to acts for which he has received a pardon or has been granted immunity. *See id.* at 66-67.

52 *Id.* at 69. The Court emphasized that to permit otherwise would be "to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation." *Id.* at 70.

53 *Id.* at 74-75.

54 *Id.*

55 221 U.S. 361 (1911).

56 The subpoena called for the production of any of the corporation's letter press copy books that contained copies of correspondence signed by the president of the corporation during the months of May and June 1909. *See id.* at 368.

57 *See id.* at 367-68.

58 Indictments had been filed against the president, certain other officers, directors, and stockholders of the corporation. *See id.* at 367.

59 The indictments charged the targets with one count of mail fraud and one count of conspiracy to commit mail fraud. *See id.*

60 Wilson claimed that, in addition to business correspondence, the documents contained copies of his personal and other correspondence; that the documents were in his possession, custody, and control as against other officers of the corporation; and that the documents contained information that would tend to incriminate him. *See id.* at 368-69.

61 *See id.* at 369.

62 In addition to arguing that compelling him to turn over the documents violated his Fifth Amendment privilege against self-incrimination, Wilson argued that it violated the Sixth Amendment witness confrontation privilege and the Fourth Amendment prohibition against unreasonable search and seizure. *See id.* at 375-76.

63 *See id.* at 384-85.

64 *See id.* at 383-84 (citing Hale v. Henkel, 201 U.S. 43).

to assert his personal Fifth Amendment right in opposing the production of corporate documents when the corporation can assert no such right.[65]

In 1944, the Court further limited the application of the Fifth Amendment to collective entities. As noted above, *Hale* had relied upon a "creature of the State" rationale in concluding that a corporation should not be able to assert the Fifth Amendment privilege against self-incrimination.[66] This rationale was abandoned when the Court held, in *United States v. White*,[67] that an unincorporated labor union could not assert the privilege against self-incrimination.[68] To support this holding the Court formulated a new test for when an organization should be precluded from asserting the Fifth Amendment privilege against self-incrimination. The test announced by the Court was:

> whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interest of its constituents, but rather to embody their common or group interests only.[69]

If an organization met this test it could not assert the privilege against self-incrimination.

Applying its new test, the *White* Court determined that a labor union cannot assert a Fifth Amendment privilege and, therefore, a union official[70] could not refuse to produce union documents[71] even though they

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65 *Id.* at 385.

66 *See Hale*, 201 U.S. at 75 ("It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how those franchises had been employed, and whether they had been abused, and demand the production of the corporate books and records for that purpose.") The Court was not deterred by the fact that the corporation in *Hale*, like most corporations, was chartered by a state (New Jersey) and the investigation was being conducted by a federal grand jury. *See id.* ("Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State.").

67 322 U.S. 694 (1944).

68 *See id.* at 700-01. The Court subsequently characterized the rationale of *Wilson* as the "visitorial powers doctrine." *See* Bellis v. United States, 417 U.S. 85, 92 (1974). In *Bellis*, the Court recast the visitorial powers doctrine as "a recognition that corporate records do not contain the requisite element of privacy or confidentiality essential for the privilege to attach." *See id.* This recharacterization reflects the inadequacy of the visitorial powers doctrine to justify withholding the privilege from collective entities that are not chartered by the State. Ultimately even the "privacy or confidentiality" rationale fell by the wayside, when the *Fisher* decision shifted the focus of Fifth Amendment analysis from privacy to the compulsion of "testimonial" communications. *See infra* Part I.A.3.

69 *White*, 322 U.S. at 701.

70 White described himself as an "assistant supervisor" of the union. *Id.* at 695.

71 Although White possessed the requested union documents, he was not the authorized custodian of the requested documents. *Id.*

might incriminate him.[72] The Court stopped short of denying an individual a Fifth Amendment right for personal documents, however, noting that the privilege against self-incrimination is a personal one "designed to prevent the use of legal process to force [an individual] to produce and authenticate any personal documents or effects that might incriminate him."[73] Thus the Court continued to view the Fifth Amendment privilege as "protect[ing] the individual from any disclosure, in the form of oral testimony, documents or chattel, sought by legal process against him as a witness"[74] and continued to rely upon *Boyd*.[75] Nonetheless, the cumulative effect of *Hale*, *Wilson*, and *White* erased *Boyd*'s Fifth Amendment holding for collective entities.[76]

Any doubts about the continued vitality of *Boyd*'s underlying premise that a collective entity can assert the Fifth Amendment privilege against self-incrimination were dispelled by the Supreme Court in its 1974 decision in *Bellis v. United States*.[77] *Bellis* held that a partner in a business partnership[78] cannot invoke the privilege in response to a

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72 The *White* Court cited *Hale* and *Wilson* as establishing that the privilege against self-incrimination is not available to corporations and therefore corporate officials cannot assert the privilege against self-incrimination when responding to a subpoena duces tecum for corporate documents even though the corporate documents might incriminate the officials personally. *Id.* at 699-700.

73 *Id.* at 698. White made no claim that any part of the subpoenaed union documents consisted of his own private papers. *Id.* at 704.

74 *Id.* at 699.

75 The Court cited *Boyd* for the proposition that "the papers and effects which the [Fifth Amendment] privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity." *See id.*

76 In 1957, the Court did recognized one significant limitation on the government's ability to require individual witnesses to provide information about documents subpoenaed from collective entities. In *Curcio v. United States*, 354 U.S. 118 (1957), the Court held that, absent a grant of immunity, a custodian of documents cannot be compelled to provide oral testimony regarding his refusal to produce subpoenaed entity documents. *Id.* at 123-24. The Court differentiated between compelling a custodian to give oral testimony regarding the identification of the produced documents of an artificial entity and compelling him to give oral testimony regarding the whereabouts of documents that he had refused to produce. *See id.* at 125. While the Court conceded that requiring the custodian to identify the documents would authenticate the documents, it stated that this "merely makes explicit what is implicit in the production itself" and that "the custodian is subjected to little, if any, further danger of incrimination." *Id.* Compelling the custodian to testify regarding the whereabouts of the unproduced documents, in contrast, would provide evidence against the witness that would support a charge of criminal contempt, which would be a direct violation of the Fifth Amendment privilege against self-incrimination. *See id.* at 124. The Court also reiterated that in order for a witness to make a showing of possible incrimination "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 121 n.2 (quoting Hoffman v. United States, 341 U.S. 479, 486-87 (1951)).

77 417 U.S. 85 (1974).

78 The partnership at issue was a small law partnership that dissolved when Bellis left the firm, although the partnership was still "winding up its affairs" when the subpoena was served. *Id.* at 86. Under the applicable Pennsylvania law a partnership was not terminated "until the winding up of partnership affairs [was] completed." *Id.* at 96 n.3 (citing PA. STAT. ANN., tit. 59, § 92 (1964)).

subpoena duces tecum for partnership business records.[79] Writing for the majority, Justice Marshall reasoned that a partnership is not a natural person[80] and that a partner in a partnership had no expectation of privacy with respect to the financial records of an organized entity such as his partnership.[81]

Bellis applied the *White* test to a small, three-member partnership and in doing so acknowledged that the *White* test was "not particularly helpful" in assessing the application of the Fifth Amendment to small collective entities that embodied both group interests and the personal interests of members.[82] Nonetheless, the Court concluded that the small[83] *Bellis* partnership met the *White* test[84] because it had "an established institutional identity independent of its individual partners."[85] The Court also concluded that the financial records of the partnership were the property of the partnership, not an individual partner,[86] and Bellis was holding the records in a representative capacity, not in his individual capacity.[87] As a separate collective entity, the partnership could not

79 *See Bellis*, 417 U.S. at 85-86.

80 Justice Marshall cited to previous Supreme Court decisions that had uniformly held that the privilege against compulsory self-incrimination protects "only the natural individual from compulsory incrimination through his own testimony or personal records." *Id.* at 89-90 (quoting *White*, 322 U.S. at 701). The Court's focus on the rights of individuals was accompanied by a concern regarding law enforcement against large collective entities. As Justice Marshall observed, "The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations." *Bellis*, 417 U.S. at 91 (quoting *White*, 322 U.S. at 700).

81 *See Bellis*, 417 U.S. at 90-91. The *Bellis* Court relied upon "privacy or confidentiality" as a policy interest protected by the Fifth Amendment privilege against self-incrimination. *See id.* at 91-92.

82 *See id.* at 100.

83 Bellis had emphasized language in *White* suggesting that the test for applicability of the Fifth Amendment is whether an organization "has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." *Id.* at 100 (quoting *White*, 322 U.S. at 701). The Court rejected the argument that the *White* test "can be reduced to a simple proposition based solely upon the size of the organization. *Bellis*, 417 U.S. at 100.

84 The *Bellis* Court restated the *White* test applicable to an organization as a separate entity, independent of its members, if the organization is "relatively well organized and structured . . . maintains a distinct set of organizational records . . . recognizes rights in its members of control and access to [its records and] the records subpoenaed must in fact be organizational records held in a representative capacity." *Id.* at 92-93.

85 *Id.* at 95.

86 Justice Marshall wrote that Bellis had no reasonable expectation of privacy with regards to the partnership records since the partnership was an organized, regulated entity and Bellis, even if he was the custodian of the partnership records, had no right to keep the other partners from examining the records. *See id.* at 92. The Court acknowledged that a different case would be presented if Bellis had been ordered to produce files that contained work he had personally done on behalf of his clients, even if those files might for some purposes be viewed as those of the partnership. *See id.* at 98 n.9.

87 *See id.* at 97-99.

assert a Fifth Amendment privilege, [88] and neither could Bellis as a custodian of the partnership records holding those records in a representative capacity.[89]

In one respect, the holding in *Bellis* was difficult to reconcile with *Boyd*; both cases involved compulsory production of documents by a partnership, as Justice Marshall acknowledged in a footnote to his *Bellis* opinion.[90] He downplayed the importance of this similarity between the two cases by noting that in *Boyd*, "the potential significance of this fact was not observed by either the parties or the Court."[91] The *Boyd* Court did not consider whether the documents at issue in that case "might be a partnership record held in a representative capacity, and thus not within the scope of the privilege," and, therefore, did not decide the issue that was before the *Bellis* Court.[92] Thus Justice Marshall was able to dismiss *Boyd* as precedent relevant to the Fifth Amendment issue in *Bellis* without directly overruling the holding in *Boyd*.[93]

While the collective entity line of cases that culminated in *Bellis* may have effectively overruled the Fifth Amendment holding of *Boyd* when a document subpoena is directed to an organization, a central premise of *Boyd* survived the collective entity line of cases intact and unquestioned. As Justice Marshall emphasized in his *Bellis* footnote distinguishing *Boyd*, the latter case was decided "on the premise that it involved 'the compulsory production of a man's private papers.'" [94] Nothing in *Bellis* or any of the collective entity cases that preceded it suggests that a distinction should be drawn between documents and testimony, so long as it is an individual and not a collective entity being compelled to provide them. To the contrary, the Court's analysis in *Bellis* began with an acknowledgment that "[i]t has long been established, of course, that the Fifth Amendment protects an individual from compelled production of his personal papers and effects as well as

88 The Court noted that not all partnerships would meet the *White* test. It suggested that a small family partnership or a partnership where pre-existing relationships of confidentiality existed among the partners would might be exempt from such a test. *See id.* at 101.

89 *See id.* at 93, 97-98. Justice Douglas dissented from the Court's holding, arguing that Bellis was not holding the partnership records in a representative capacity, but rather because they were "his own, in both a legal and practical sense." *Id.* at 104. Justice Douglas pointed out that if Bellis had been conducting a solo law practice, he could have asserted a Fifth Amendment privilege, and argued that he should not be held to have forfeited his constitutional right by joining with two others in a law partnership. *Id.*

90 *See id.* at 95 n.2.

91 *Id.*

92 *Id.*

93 Justice Douglas viewed the matter differently. In his dissenting opinion he described the majority opinion in *Bellis* as "effectively overruling *Boyd* in holding that the Government can compel an individual to produce his private records to aid a government investigation of him." *Id.* at 105.

94 *Id.* at 95 n.2 (citing Boyd v. United States, 116 U.S. 616, 622 (1886)).

compelled oral testimony."[95] Therefore, it seems fair to conclude that the development of the collective entity doctrine alone did not lead to the dramatic reinterpretation of the Fifth Amendment's application to documents that the Court announced in *Fisher*.

3. The New Focus on Personal Compulsion.

Certain elements of the reasoning underlying the collective entity doctrine, however, seem to have influenced the *Fisher* Court's new concept of the protection provided by the Fifth Amendment privilege against self-incrimination. That reasoning can be found in the Court's opinion in *Couch v. United States*,[96] a case decided the year before *Bellis* that foreshadowed what was to come three years later in *Fisher*. Couch was the sole owner of a restaurant who had hired an accountant to prepare her income tax returns and in so doing Couch had given the accountant her business[97] records.[98] The Internal Revenue Service began an investigation of Couch's tax returns, examined her business records that were in the possession of her accountant,[99] and, based upon the examination, commenced an investigation[100] of Couch.[101] When an IRS special agent arrived to re-examine Couch's business records at the office of the accountant, he was denied access to the records, so he issued a summons to the accountant requiring production of the records at a later date.[102] When he arrived to review the records on the return date of the summons, he discovered that the accountant had given the records to Couch's attorney.[103]

The IRS petitioned the district court to enforce the summons, and after the court ordered the summons to be enforced, Couch appealed.[104] Couch argued, before the Supreme Court, that she could assert the Fifth Amendment privilege against self-incrimination[105] because she owned the

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95 *See id.* at 87.

96 409 U.S. 322 (1973).

97 Although they were business records, the Court seems to assume that they would still be "private" papers. *See id.* at 330 (discussing application of *Boyd*). Instead, the Court focused its analysis on the fact that ownership and possession of Couch's records diverged (*see* discussion *infra*).

98 *See Couch*, 409 U.S. at 324. The business records provided by Couch to the accountant included bank statements, payroll records, and reports of sales and expenditures. *Id.*

99 They examined the records in the accountant's office with his permission. *See id.*

100 The IRS was investigating the possibility of income tax fraud. *See id.*

101 *See id.*

102 The IRS had issued a summons, pursuant to 26 U.S.C. § 7602, on August 18, 1969; the return date of the summons was September 2, 1969. *See Couch*, 409 U.S. at 324-25.

103 *See id.* at 325.

104 *See id.* at 329.

105 Couch also claimed that the summons violated the Fourth Amendment but the Court refused to consider this argument since it was not raised in appellant's brief. *See id.* at 325 n.6.

business records.[106] The *Couch* court rejected this argument, holding that Couch's privilege against compulsory self-incrimination was not violated because there was no governmental compulsion and no reasonable expectation of privacy.[107]

The Court reiterated that the privilege against self-incrimination is a purely personal privilege[108] and that the privilege is intended to protect against the "extortion of information from the accused himself"[109] rather than to prevent incriminating evidence from being produced by a third party.[110] This aspect of the Court's reasoning is consistent with the collective entity cases, which emphasized the personal nature of the privilege and the separate identity of the organization.[111] The other aspect of the Court's reasoning in *Couch*, in contrast, signals a new approach to Fifth Amendment analysis. The Court reasoned that since Couch herself had not been compelled to do anything,[112] there was none of the personal compulsion that is required for an individual to invoke the Fifth Amendment privilege.[113] The Court emphasized that the Fifth Amendment privilege does not protect the accused when third parties are compelled to produce incriminating evidence; the privilege only protects the accused from having to produce that incriminating evidence herself.[114] *Couch* therefore marks the beginning of the Court's focus on the element of compulsion in Fifth Amendment cases, albeit in the context of a case in which a third party had possession of the documents at issue.

Much as it would do the following year in *Bellis*, the *Couch* Court sought to distinguish *Boyd* without directly overruling it. The Court held that mere ownership of documents without possession is not always sufficient to invoke the privilege against compulsory self-incrimination, noting that decisions applying *Boyd* had "largely been in

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106 *See id.* at 325.

107 *See id.* at 336.

108 "A party is privileged from producing the evidence [himself] but not from its production." *Id.* at 328 (quoting Johnson v. United States, 228 U.S. 457, 458 (1913)).

109 "Our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play . . . [and] our respect for the inviolability of the human personality and of the rights of each individual" dictate this protection. *Couch*, 409 U.S. at 328 (quoting Murphy v. Waterfront Comm'n., 378 U.S. 52, 55 (1964)).

110 *See Couch*, 409 U.S. at 328.

111 *See supra* Part I.A.2.; *see also* Bellis v. United States, 417 U.S. 85, 88-91 (1974) (summarizing cases).

112 The summons and the order enforcing it were directed against the accountant, not Couch herself. *See Couch*, 409 U.S. at 329.

113 *See id.*

114 *See id.* It is noteworthy that even here, in the decision that is the closest antecedent to *Fisher*, the Supreme Court did not distinguish between compulsion to produce documentary evidence and compulsion to provide oral testimony.

instances where possession and ownership conjoined."[115] To address the undisputed fact that Couch retained ownership of the documents at issue,[116] the Court reasoned that "possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment"[117] and that ownership is not a workable litmus test for application of the Fifth Amendment's protections.[118] This focus on "personal compulsion" is indicative of the approach to Fifth Amendment analysis that the Court would take a few years later in *Fisher*.

While the *Couch* Court emphasized possession rather than ownership, it was careful to point out that it was not adopting a simple "bright-line rule" based on possession.[119] Instead the Court acknowledged that situations could arise in which constructive possession of documents by the accused or temporary, insignificant relinquishment of possession[120] would support a claim of unconstitutional governmental compulsion by the owner if the documents were then seized from the person who had possession.[121] Couch's surrender of possession,[122] in contrast, was sufficient to "disqualify her entirely as an object of any impermissible Fifth Amendment compulsion."[123]

At the conclusion of its opinion in *Couch*, the Court stated that the important factors to examine in assessing Fourth or Fifth Amendment claims are (i)whether there is an expectation of privacy, and (ii)whether

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115 *Id.* at 330.

116 *See id.* at 324.

117 *Id.* at 331.

118 *Id.* The Court took the position that if ownership of the documents at issue was the sole test for application of the privilege, it would have the incongruous result of protecting business records owned by the accused that were in the possession of an accountant, while not protecting business information communicated to the accountant orally or by letter such that title to the documents containing the information was held by the accountant. *Id.* In the Court's view, this approach "would thus place unnecessary emphasis on the form of communication to an accountant and the accountant's own working methods, while diverting the inquiry from the basic purposes of the Fifth Amendment's protections." *Id.* Unfortunately, the Court did not further identify or explain those purposes or why they would be offended by a voluntary relinquishment of information to a third party. In fact, providing information to a third party outside the context of a privileged relationship, *see id.* at 335-36 (explaining that Couch's communications with her accountant were not privileged), may well result in a loss of Fifth Amendment protection even under the modern act of production doctrine. For further discussion of this issue, see *infra* note 203.

119 *Couch*, 409 U.S. at 336 n.20.

120 An example raised at oral argument was a subpoena served on a third party who was carrying the accused's briefcase across the street. *Id.* at 333 n.15. The Court declined to judge the merits of hypothetical fact situations, however. *Id.*

121 *Id.* at 333.

122 The Court noted both the length of time Couch's accountant had possessed the records and the accountant's independent status. *See id.* at 334. Couch's records had been in her accountant's continuous possession for fourteen years prior to the issuance of the summons and the accountant did not work as an employee of Couch. *See id.* Presumably, if Couch had surrendered possession of the documents to an employee for a short period of time, the outcome would have been different.

123 *Id.* at 334-35.

there is governmental compulsion against the accused himself.[124] As the discussion below points out, only one of these considerations—compulsion against the accused—survived *Fisher*'s new approach to Fifth Amendment analysis. The other consideration identified by the *Couch* Court—the expectation of privacy[125]—was rejected by *Fisher* and its progeny as not among the interests protected by the Fifth Amendment privilege against self-incrimination.

B. The *Fisher* Decision and the Fifth Amendment "Act of Production" Doctrine.

1. *Fisher*'s New Textualist Analytical Approach.

In *Hubbell*, the Supreme Court began its analysis of the Fifth Amendment's application to compelled production of documents with the "settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not 'compelled' within the meaning of the privilege." [126] This matter of fact assertion, unthinkable in the era of *Boyd*, is a direct outgrowth of *Fisher*'s new conception of the nature of the protection against self-incrimination provided by the Fifth Amendment.[127]

Fisher rejected both property rights[128] and personal privacy[129] as rationales for protection against self-incrimination; instead, it looked to

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124 *See id.* at 336.

125 The clearest indication that *Couch* foreshadowed a major shift in the Court's conception of the protection provided by the Fifth Amendment privilege against self-incrimination is the argument contained in Justice Marshall's dissent. The Marshall dissent in *Couch* seems to recognize that the majority's focus on possession and compulsion threatened the Fifth Amendment holding of *Boyd* that had survived the development of the collective entity doctrine. Justice Marshall argued that if the act of producing the documents would be incriminating it would be unconstitutional. *See id.* at 347. Justice Marshall believed that criteria should be developed to determine whether records sought by summonses were within the expectation of privacy of the accused. *See id.* at 350. His suggested criteria were as follows: "the nature of the evidence . . . the ordinary operations of the person to whom the records are given . . . the purposes for which the records were transferred . . . [and] the steps taken by the accused to insure the privacy of the records." *See id.* at 350-51.

126 United States v. Hubbell, 530 U.S. 27, 35-36 (2000) [hereinafter *Hubbell II*].

127 *See generally* Kenneth J. Melilli, *Act-of-Production Immunity*, 52 OHIO ST. L.J. 223, 235 (1991); Anne Marie DeMarco & Elisa Scott, *Confusion Among the Courts: Should the Contents of Personal Papers be Privileged by the Fifth Amendment's Self-Incrimination Clause?*, 9 ST. JOHN'S J. LEGAL COMMENT. 219, 219 (1993); Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, *supra* note 1, at 683.

128 *See, e.g.*, Heidt, *supra* note 45, at 470; *see also* Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, *supra* note 1, at 684-85 (discussing the pre-*Fisher* "property-oriented view of the Fifth Amendment and concluding that *Fisher* and its progeny have "narrowed and ultimately rejected this view").

129 *See* United States v. Hubbell, 167 F.3d 552, 572 (D.C. Cir. 1999) ("As the Supreme Court moved away from the doctrine articulated in *Boyd v. United States* . . . and towards a more literal

the text[130] of the Fifth Amendment and focused on the compulsion of "testimonial" communications as the touchstone for self-incrimination analysis.[131] Whatever the merits of this new analytical approach, it is undisputed that it narrowed the protection against self-incrimination afforded by the Fifth Amendment.[132] This narrower reading of the Fifth Amendment may have been necessitated by the application of the Fifth Amendment (with other provisions of the Bill of Rights) to the states and the subsequent development of the line of authority permitting compulsion of handwriting specimens, voice exemplars, and blood samples on the theory that such information was not "testimonial."[133] The net result, however, was a virtually complete redefinition of what constitutes "communicative"[134] testimony that is protected by the Fifth Amendment.[135]

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interpretation of the privilege against self-incrimination . . . it jettisoned the personal privacy justification in favor of a rationale tied far more directly to the nature of government compulsion.") (citations omitted); *see also* Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, *supra* note 1, at 686 (stating that "under *Fisher* mere privacy concerns are unprotected by the fifth amendment"); United States v. Doe, 465 U.S. 605, 611 (1984) [hereinafter *Doe I*]; Heidt, *supra* note 45, at 471; Suzanne Rosenthal Brackley, *Constitutional Law: Now it's Personal: Withdrawing the Fifth Amendment's Content-Based Protection for all Private Papers in* United States v. Doe, 60 BROOK. L. REV. 553, 571 (1994); Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, *supra* note 1, at 694 & text accompanying nn.62-63; Will, *supra* note 6, at 975.

130 *See* Fisher v. United States, 425 U.S. 391, 396-97 (1976) (quoting the text of the fifth amendment and emphasizing the words "compelled" and "witness against himself"); *see also Doe I*, 465 U.S. at 610; South Dakota v. Neville, 459 U.S. 553, 562 (1983); Nagareda, *supra* note 7, at 1597; Will, *supra* note 6, at 975.

131 This new approach is subject to challenge on grounds of historical validity, *see Hubbell*, 530 U.S. at 49 (Thomas, J. and Scalia, J. concurring) *and* Nagareda, *supra* note 7, at 1591, but the historical merit of the *Fisher* approach falls outside the scope of this Article.

132 *See, e.g.*, Leo P. Martinez, *The Summons Power and Tax Court Discovery: A Different Perspective*, 13 VA. TAX REV. 731, 741 (1994); Comment, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, *supra* note 1, at 683 (observing that "the focus on compulsion has narrowed the protection offered by the fifth amendment"); Brackley, *supra* note 129, at 558; Shauna J. Sullivan, *Fifth Amendment Protection and the Production of Corporate Documents*, 135 U. PA. L. REV. 747, 755 (1987).

133 *See Fisher*, 425 U.S. at 408; *see also* United States v. Hubbell, 167 F.3d 552, 572-75 (1999) (discussing "nontestimonial" cases), *aff'd.*, 530 U.S. 27, 46 (2000); Comment, *Fifth Amendment Interpretation in Recent Tax Record Production Cases*, 46 U. CINN. L. REV. 232, 236-38 (1977) (discussing the development of the "nontestimonial rationale" and observing that the "main application of the nontestimonial rationale has been in cases dealing with the compelled production of evidence relating to physical characteristics"); Nagareda, *supra* note 7, at 1590-91; Arthur B. Laby, *Fishing for Documents Overseas: The Supreme Court Upholds Broad Consent Directives Against the Claim of Self-Incrimination*, 70 B.U. L. REV. 311, 332 (1990). The "nontestimonial" physical production cases are described *infra* at notes 214-17.

134 *See Hubbell*, 167 F.3d at 574.

135 Justice Brennan recognized *Fisher*'s potential for redefining the scope of the fifth amendment's protection of private papers, declining to join in the majority opinion "because of the portent of much of what is said of a serious crippling of the protection secured by the privilege against the compelled production of one's private books and papers." *Fisher*, 425 U.S. at 414 (Brennan, J., concurring).

The most recent and most detailed explication of the *Fisher* analytical approach to Fifth Amendment protection is the lengthy opinion of the District of Columbia Court of Appeals in the *Hubbell* case.[136] At the outset of its opinion, the court forthrightly acknowledged that it was dealing with an "admittedly abstract and under-determined area of the law." [137] This candid acknowledgement reflects the confusion and criticism that the *Fisher* opinion has spawned in the twenty-five years since it was decided.[138] The lengths (both literal and figurative) to which the D.C. Circuit went[139] to explain how *Fisher* applies to that most simple and straightforward legal discovery device—a subpoena for documents and business records—reflects this confusion and demonstrates the crying need for clarity in this important area of law. Before examining the D.C. Circuit's analysis in *Hubbell*, it is useful to examine the analytical framework established by the Supreme Court in *Fisher* and its progeny.

2. Compulsion of Testimonial Communications.

The main source of confusion in the *Fisher* opinion is the distinction that the Court drew between the testimonial aspects of the contents of documents, on the one hand, and the act of producing the documents, on the other.[140] In *Fisher*, Justice White acknowledged that a subpoena requiring a taxpayer to produce "an accountant's workpapers in

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136 United States v. Hubbell, 167 F.3d 552 (1999), *aff'd.*, 530 U.S. 27, 46 (2000). The D.C. Circuit is not alone in recognizing the difficulty of the legal analysis required by *Fisher*. In 1987, Professor Mosteller noted that "[t]he law in this area is extraordinarily complicated and conflicting." Mosteller, *supra* note 1, at 1. Prior to *Hubbell*, lower court decisions applying *Fisher* and its progeny had further confused the already-confusing principles set out in *Fisher*.

137 *Hubbell*, 167 F.3d at 570. Professor Uviller has described the law in this area as "an obscure—if not exotic—extension of the Fifth Amendment right not to be compelled to assist in one's own conviction." Uviller, *supra* note 23, at 312.

138 *See, e.g.*, Brackley, *supra* note 129, at 570; Davis, *supra* note 5, at 108; Nagareda, *supra* note 7, at 1578.

139 In addition to the standard citations to case law and law review articles, the thirty-one page, per curiam majority opinon (which, in fairness, includes almost ten pages devoted to the issue of whether Independent Counsel Kenneth W. Starr had jurisdiction to pursue Hubbell for tax evasion and related crimes, *see Hubbell*, 167 F.3d at 554-63) contains citations to works on logic by philosophers David Hume and Bertrand Russell, *id.* at 570, and on the limits of categorization by Ludwig Wittgenstein, *id.* at 578. As the dissenting judge notes, *Fisher* and its progeny have fostered more "metaphysical speculation" than legal clarity in the area of Fifth Amendment protections. *See id.* at 597 (Williams, J., dissenting) (citing Alito, *supra* note 8, at 59 (predicting that *Fisher* and *Doe* would "inevitably lead" to "metaphysical speculation")). Ironically, citations to philosophers and concerns about metaphysical speculation notwithstanding, the net result of the *Hubbell* holding is to restore Fifth Amendment protection of an individual's documents to something very near the straightforward, common-sense rules that applied prior to *Fisher*. *See infra* Parts II.B.2. and IV.C.

140 *See Fisher*, 425 U.S. at 410-11 (1976). The *Fisher* court did not invent the act of production theory; the theory's origins can be traced back to Wigmore's treatise on evidence, which criticized the *Boyd* opinion and offered the act of production theory as a means of rationalizing the holding in that case. *See* Alito, *supra* note 8, at 46; *see also* Heidt, *supra* note 45, at 442 (describing *Fisher* as having "adopted the implied admissions rationale long espoused by Wigmore").

his possession without doubt involves substantial compulsion." [141] Nonetheless, because the subpoena does not compel oral testimony and does not compel the taxpayer to "restate, repeat, or affirm the truth of the contents of the documents sought," the Court concluded that compelling a taxpayer to produce his accountant's workpapers does not violate the Fifth Amendment.[142] This conclusion rested upon the premise that "the privilege protects a person only against being incriminated by his own compelled testimonial communications," [143] and no testimonial communications would be compelled from the taxpayer. Applying this reasoning to the two cases under review in *Fisher,* Justice White repeatedly emphasized in his opinion the factual bases for this conclusion: in both cases, (i) the subpoenaed documents were the accountants' papers, not the personal papers of the taxpayers;[144] (ii) the papers were not prepared by the taxpayers;[145] (iii) the papers were prepared voluntarily, without any compulsion;[146] (iv) the taxpayers would not be required to authenticate the papers;[147] and (v) the existence of the papers was known to the government.[148]

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141 *Fisher*, 425 U.S. at 409.

142 *Id.* In *Fisher* the taxpayers had transferred possession of the workpapers to their attorneys, but the Court concluded that the transfers to the attorneys for the purpose of obtaining legal advice did not waive any Fifth Amendment privilege that the taxpayers otherwise could have asserted. *Id.* at 402-405. The Court then went on to conclude that, for the reasons discussed, the taxpayers had no Fifth Amendment privilege in the accountants' workpapers. *Id.* at 414.

143 *Id.*

144 *Id.* ("The accountant's workpapers are not the taxpayer's."); *id.* at 411 ("The papers belong to the accountant, were prepared by him, and are the kind usually prepared by an accountant working on the tax returns of his client."); *id.* at 414 ("Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers,' . . . .").

145 *Id.* at 409 ("They were not prepared by the taxpayer, and they contain no testimonial declarations by him."); *id.* at 411 ("The papers belong to the accountant, were prepared by him, and are the kind usually prepared by an accountant working on the tax returns of his client."); *id.* at 413 ("The taxpayer did not prepare the papers and could not vouch for their accuracy.").

146 *Id.* at 409 ("Furthermore, as far as the record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary . . . ."); *id.* at 410 n.11 ("And, unless the Government has compelled the subpoenaed person to write the document . . . . the fact that it was written by him is not controlling with respect to the Fifth Amendment issue.") (citations omitted).

147 *Id.* at 412-13 ("As for the possibility that responding to the subpoena would authenticate the work papers, production would express nothing more than the taxpayer's belief that the papers are those described in the subpoena. The taxpayer would be no more competent to authenticate the accountant's work papers or reports by producing them than he would be to authenticate them if testifying orally.") (footnote omitted); *id.* at 413 n.13 ("In seeking the accountant's 'retained copies' of correspondence with the taxpayer in No. 74-611, we assume that the summons sought only 'copies' of original letters sent from the accountant to the taxpayer—the truth of the contents of which could be testified to only by the accountant.").

148 *Id.* at 411 ("The existence and location of the papers are 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."); *id.* ("Surely the Government is in no way relying on the 'truthtelling' of the taxpayer to prove the existence of or his access to the documents."). As the D.C. Circuit noted in its *Hubbell* opinion, "[In the *Fisher* case, the] taxpayer had also stipulated to both the existence of the

3. Contents versus Act of Production.

Had the *Fisher* opinion stopped at this point in its analysis and merely held that under those particular circumstances the taxpayers' Fifth Amendment privilege would not protect against compelled production by the taxpayers' attorneys of the accountants' papers, then the opinion would have been unremarkable and probably now would be long-since forgotten.[149] In an effort (arguably a reach[150]) to rationalize Fifth Amendment law and provide an analytical framework for future cases, however, the opinion went on, beyond the facts of the cases then before the Court,[151] and laid the groundwork for the "act of production doctrine."[152] The cornerstone of this doctrine is the statement in *Fisher* that "the act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced."[153] The Court identified those communicative aspects as the subpoena respondent "tacitly conced[ing]" that the papers produced in response to a subpoena (1) exist, (2) are in the respondent's possession or control, and (3) are those described by the subpoena.[154] Whether or not a particular production of documents would involve a tacit testimonial communication of these facts would "depend on the facts and circumstances of particular cases or classes thereof,"[155] but the Court concluded that in *Fisher* the enforcement of the subpoenas for the accountants' papers would not compel the taxpayers to communicate any of these three categories of information.[156]

The Court's analysis of the testimonial value of the communication inherent in the act of production of the documents sought in the *Fisher* case ultimately would raise more questions than it answered.

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documents and that they were those described in the subpoena." United States v. Hubbell, 167 F.3d 552, 570 (D.C. Cir. 1999) (citing *Fisher*, 425 U.S. at 430 n.9 (Brennan, J., concurring)).

149 *Cf.* Alito, *supra* note 8, at 42 ("*Fisher* involved a more complicated factual situation and could well have been decided without reexamining *Boyd.*").

150 *Cf.* Heidt, *supra* note 45, at 473 (characterizing the implied admissions theory as "attenuated in principle and unworkable in application").

151 The Court could just as easily have concluded that because the papers sought here were the accountants' papers, not the taxpayers' papers, *see supra* nn.144-48 (listing the five factors upon which the *Fisher* Court based its opinion), nothing of substance was being compelled from the taxpayers. *Compare Fisher*, 425 U.S. at 397 ("The taxpayer's privilege under this Amendment is not violated by enforcement of the summonses involved in these cases because enforcement against a taxpayer's lawyer would not 'compel' the taxpayer to do anything—and certainly would not compel him to be a 'witness' against himself.").

152 *See Fisher*, 425 U.S. at 410-11.

153 *Id.* at 410.

154 *Id.*

155 *Id.*

156 *See id.* at 411-13.

In *Fisher*, the Court could easily dispose of the issue because the government already knew of the documents' existence and location, permitting the Court to coin its celebrated "foregone conclusion" phrase: "The existence and location of the papers are 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."[157] Although the "foregone conclusion" characterization applied well to the unusual facts of *Fisher*, it merely begged the question of whether the Fifth Amendment would protect the act of production of documents in the more typical case in which a witness is subpoenaed to produce his or her own "private papers."[158]

4. *United States v. Doe* and the Failure of the Court to Articulate a "Testimonial Value" Test.

Fisher expressly declined to decide "[w]hether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession."[159] The Court addressed that question seven years later in *United States v. Doe*.[160] *Doe* held that the contents of an individual's voluntarily prepared business records are not protected by the Fifth Amendment privilege against self-incrimination.[161] The conclusion that the contents of an individual's business records are not privileged settled one question and reversed the decision below of the Third Circuit Court of Appeals, which had held that notwithstanding *Fisher* the contents of an individual's business records are privileged;[162] however, it was the beginning, not the end, of the Court's analysis of the application of the privilege to private business records. The remaining question was whether the act of production of private business records is protected by the Fifth Amendment under the *Fisher* "testimonial communications" analytical approach.

With respect to this critical issue the *Doe* Court, like the *Fisher* Court seven years earlier, declined to articulate a test of general application that the lower courts could use to assess the testimonial value of an act of production of documents. *Fisher* had said only that the resolution of this issue "depend[s] on the facts and circumstances of

157 *Id.* at 411.

158 *Id.* at 414.

159 *Id.* at 414; *see also* United States v. Doe, 465 U.S. 605, 610 (1983) [hereinafter *Doe I*] ("The Court in *Fisher* expressly declined to reach the question whether the Fifth Amendment privilege protects the contents of an individual's tax records in his possession.") (footnote omitted).

160 *Doe I*, 465 U.S. 605.

161 *See id.* at 612.

162 680 F.2d 327, 334 (3d Cir. 1982); *see Doe I*, 465 U.S. at 609 (describing the holding of the Court of Appeals).

particular cases or classes thereof."[163] *Doe*, rather than identifying or defining a "testimonial value test" for deciding when an act of producing documents is privileged under the Fifth Amendment, relied upon the factual findings of the two courts below, the District Court for the District of New Jersey and the Third Circuit Court of Appeals. Those courts had held that the act of producing the documents under subpoena in that case "would involve testimonial self-incrimination."[164] Because both lower courts had concluded that the act of producing the documents would involve testimonial communications as defined in *Fisher*, the *Doe* Court accepted that conclusion, but did not independently address or analyze the issue.[165]

Oddly enough, the net result of the two cases was a new legal doctrine—the *Fisher* "testimonial communications" analysis applied to the act of production of documents—announced by the Court with no real guidance to the lower federal courts as to how that doctrine should be applied. Add to that the fact that this new doctrine applied to the basic discovery device for federal criminal investigations, the grand jury subpoena duces tecum,[166] and it is not surprising that the net result of this lack of specific analytical guidance was what the District of Columbia Court of Appeals in the *Hubbell* case called an "admittedly abstract and

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163 *Fisher*, 425 U.S. at 410.

164 *Doe I*, 465 U.S. at 613 n.11 (citing the district court's factual finding) and n.12 (citing the appeals court's factual analysis).

165 *Id.* at 614. The Court did apply the "facts and circumstances" test a few years later, in *Doe v. United States*, 487 U.S. 201, 214-15 (1988) [hereinafter *Doe II*] (applying the *Fisher* "facts and circumstances of the particular case" test and concluding that forcing an individual to sign a consent form authorizing foreign banks to release information about accounts he controlled "[in] itself is 'not testimonial.'" *Doe II*, however, involved the unusual circumstance of compelling consent in the form of a signature on a blank release, which the Court equated to nontestimonial actions such as providing a blood sample, *see id.*. at 213 n.11, or providing a voice exemplar, *see id.* at 214 n.12. The Court also appeared to find significance in the fact that it was a third party—the foreign banks—who was providing the evidence, and not the individual who was asserting the Fifth Amendment privilege. *See id.* at 213 n.11 (noting that "it is difficult to understand how compelling a suspect to make a nonfactual statement that facilitates the production of evidence *by someone else* offends the privilege") (emphasis added). For these reasons, *Doe II*, at least as conceptualized by the Court, fits more closely within the *Schmerber/Dionisio* line of "forced production of physical evidence" cases than the *Fisher/Doe I* "compelled production of documents" cases, and therefore provides little, if any, guidance in the latter area. Justice Stevens, dissenting in *Doe II*, argued that forcing a suspect to sign a consent form is fundamentally different from forcing him to provide physical evidence, *Id.* at 219 and n.1. He equated forced production of physical evidence with the forced "surrender [of] a key to a lockbox" (which the Fifth Amendment permits), but equated forced signature of a consent form to "be[ing] compelled to reveal the combination to a wall safe" (which the Fifth Amendment does not permit). *See id.* at 219. Although Justice Stevens dissented alone in *Doe II*, his "lockbox key/wall safe combination" analogy survived and was utilized by the D.C. Circuit in *United States v. Hubbell*, 167 F.3d 552, 580 (1999), *aff'd.*, 530 U.S. 27, 46 (2000), and it appears that the Supreme Court's *Hubbell* decision supports his conception of the protection afforded by the Fifth Amendment. *See infra* Part III. B.

166 *See supra* note 18.

under-determined area of law."[167] What is surprising is that it took twenty-five years for the Supreme Court to do what it had failed to do in *Fisher* (and in *Doe*)[168]—address the question of when the act of producing documents is a "testimonial communication" that is protected by the Fifth Amendment.[169]

III. The Impact of the *Hubbell* Case on Fifth Amendment Doctrine.

A. The D.C. Circuit's Analysis of the Act of Production Doctrine in *Hubbell*.

1. *United States v. Hubbell* – The Factual Setting.

The District of Columbia Court of Appeals labored mightily to apply the principles of *Fisher* and *Doe I* to the facts of the *Hubbell* case—facts that required an analysis of the application of the Fifth Amendment to the compelled production of private papers by an individual who was the target of a criminal grand jury investigation. In this regard, the facts of the *Hubbell* case differed from those of *Fisher* and *Doe I* in one important respect. Webster Hubbell initially invoked his Fifth Amendment privilege against self-incrimination and declined to produce any documents[170] in response to a "broad-reaching[171] subpoena duces tecum" issued by the Office of Independent Counsel Kenneth W. Starr.[172]

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167 *Hubbell*, 167 F.3d at 570. In its *Hubbell* opinion, the D.C. Circuit described the issue as follows: "The degree to which a communication must be testimonial, what the *Doe I* Court described as its "testimonial value," *Doe I*, 465 U.S. at 613, before it will invoke the Fifth Amendment's protections necessarily falls somewhere in between the poles represented by *Doe I* and *Fisher*. Precisely where on this continuum a given document production crosses the rubicon remains undetermined. The same can be said for the requisite quantum of incrimination." *Hubbell*, 167 F.3d at 569.

168 The Court has itself acknowledged this failing of *Fisher* and *Doe I*. *See* Doe v. United States, 487 U.S. 201, 209 (1988) [hereinafter *Doe II*] ("While the Court in *Fisher* and *Doe* did not purport to announce a universal test for determining the scope of the privilege, it also did not purport to establish a more narrow boundary applicable to acts alone.") In 1987, Professor Mosteller observed that *Fisher* and *Doe* left "the full meaning" of the Fifth Amendment principles announced in those cases "unclear" and that "the Court has offered little guidance on how to apply the testimonial and incriminating inquiries to the act of production." *See* Mosteller, *supra* note 1, at 3.

169 *See* United States v. Hubbell, 530 U.S. 27 (2000).

170 When he initially appeared before the grand jury, Hubbell "expressly 'decline[d] to state whether there are documents within my possession, custody, or control responsive to the Subpoena.'" *See Hubbell*, 167 F.3d at 565 (quoting from Nov. 19, 1996 grand jury transcript).

171 The "Subpoena Rider" that accompanied the subpoena duces tecum directed to Hubbell required production of eleven broad categories of documents "reflecting, referring, or relating" to Hubbell's activities, work, income, banking activities, and contacts with particular individuals. The subpoena rider is reproduced as an Appendix to the Opinion of the Court in the Supreme Court's decision in the case. *Hubbell*, 530 U.S. at 46-49 (Appendix).

172 *See Hubbell*, 167 F.3d at 563.

Hubbell produced the subpoenaed documents only after the Independent Counsel used an immunity order[173] to overcome Hubbell's assertion of his Fifth Amendment privilege with regard to the act of production.[174] Information contained in the documents produced by Hubbell under the grant of immunity led directly[175] to his indictment for tax evasion and related charges.[176] The prosecutorial use of the contents of the documents that Hubbell had produced with "act of production" immunity forced the appellate court[177] to include the element of immunity in the already complicated Fifth Amendment act of production analysis.[178] Neither *Fisher* nor *Doe* had involved an immunity grant to the individual producing the documents to the prosecution, so the Supreme Court had not included this important additional element in its prior analyses of the Fifth Amendment and the act of production.[179] For the D.C. Court of Appeals, Hubbell's immunity grant was a critical factor,[180] but the focus of the court's analysis was on the act of production and whether that act

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173 The immunity order was entered pursuant to 18 U.S.C. § 6002, and gave Hubbell "use and derivative use" immunity for the act of producing the subpoenaed documents. *See id.* at 563. *See generally* Kastigar v. United States, 406 U.S. 441 (1972). Use and derivative use immunity is discussed further *infra* Part IV.C.

174 *See Hubbell*, 167 F.3d at 563.

175 At oral argument in the Supreme Court, counsel representing the Office of Independent Counsel Starr acknowledged that "[w]e absolutely did not know about the contents of the documents" and the Court was "absolutely right" in its understanding that it was only by virtue of the production of documents that the prosecutors learned the facts that enabled them to prosecute Hubbell. 2000 WL 230520, at 3 (Transcript of Supreme Court Oral Argument).

176 *Id.* The ten-count indictment "alleged that Webster Hubbell, together with his wife Suzanna Hubbell, his tax lawyer Charles Owen, and his accountant Mike Schaufele, had committed various counts of fraud and tax evasion." *Id.* "Using the contents of the documents turned over to the grand jury, the Independent Counsel identified and developed evidence that culminated in the prosecution at issue in this case." *Id.*

177 The district court had granted Hubbell's motion to dismiss all counts of the indictment, concluding that because of the act of production immunity order and compelled production of documents "Mr. Hubbell was thereby turned into the primary informant against himself." *See* United States v. Hubbell, 11 F. Supp. 2d 25, 37 (D.D.C. 1998). In reaching this conclusion, the district court focused on the "existence" aspect of the act of production analysis and emphasized that the documents Hubbell produced "added to the 'sum total' of the independent counsel's information about him." *Id.* at 35. As is discussed in more detail below, the D.C. Court of Appeals faulted the district court for focusing its existence analysis on the contents of the documents, rather than "the government's knowledge as to the existence, possession or control, and authenticity of the subpoenaed documents—*i.e.*, the testimonial components of the act of production." *See Hubbell*, 167 F.3d at 580. The court of appeals stressed that the district court's "inquiry should have focused upon whether the government knew that the documents existed at all, and not upon whether the government know of the existence of the information contained therein." *Id.*

178 In fact, the court presented its Fifth Amendment analysis under the heading "Immunity" in the relevant portion of its opinion. *See Hubbell*, 167 F.3d at 563.

179 The district court noted that only one Supreme Court Justice had addressed "the effect of act-of-production immunity on a subsequent prosecution." *See Hubbell*, 11 F. Supp. 2d at 35 n.13 (discussing Justice Marshall's concurring opinion in *Fisher v. United States*).

180 The importance of the immunity grant to the court is evidenced by the fact that the section of the opinion containing the court's Fifth Amendment analysis is presented under the heading "Immunity." *See Hubbell*, 167 F.3d at 563.

constituted a compelled testimonial communication of incriminating information.[181] Only after addressing that issue did the court turn to question of the effect of the immunity grant and a *Kastigar* analysis.[182]

The court relied upon *Fisher* and *Doe I* for the "framework"[183] of its act of production analysis.[184] It presented those two cases as essentially creating an analytical continuum, with *Fisher* at one end establishing two key points: (i) the Fifth Amendment "does not protect the contents of pre-existing, voluntarily prepared documents,"[185] and (ii) the act of production does not implicate the Fifth Amendment if the existence and location of the subpoenaed documents is a "foregone conclusion" so that the government is not relying upon the "truth telling" of the witness who produces the documents.[186] At the other end of the continuum is *Doe I*, in which the government "knew little about the documents it subpoenaed"[187] and therefore was unable to establish that "possession, existence, and authentication were a 'foregone conclusion.'"[188] In the latter, *Doe I* situation, "complying with the subpoena would involve testimonial self-incrimination,"[189] while in the former, *Fisher* situation, "the Fifth Amendment's protections were not implicated."[190] Without further guidance from the Supreme Court,[191] the D.C. Circuit recognized that "[p]recisely where on this continuum a given document production crosses the rubicon remains undetermined."[192] The court then proceeded to place a marker in those uncharted waters by defining its own test to determine when the production of documents is a testimonial communication protected by the Fifth Amendment.

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181 *See id.* at 569-81 (Part II.B.1.b. of the court's opinion).

182 For a more detailed discussion of *Kastigar*, see *infra* Part IV.C.

183 *See Hubbell*, 167 F.3d at 567.

184 The court posed the basic Fifth Amendment inquiry as follows: "Whether addressed to oral testimony or to documentary evidence, the doctrine necessitates a showing of: i) the compulsion; ii) of testimony; iii) that incriminates." *Id.* (citing Fisher v. United States, 425 U.S. 391, 409 (1976) ("[T]he privilege protects a person only against being incriminated by his own compelled testimonial communications.")).

185 *See Hubbell*, 167 F.3d at 567.

186 *See id.* at 568.

187 *Id.*

188 *See id.* at 569 (citing United States v. Doe, 465 U.S. 605, 614 n.13 (1983) [hereinafter *Doe I*]).

189 *Hubbell*, 167 F.3d at 569.

190 *Id.* at 568.

191 *See infra* Part II.B.1. (discussing the Supreme Court's failure to provide a test for when the act of producing documents constitutes testimonial communication that is protected by the Fifth Amendment).

192 *Hubbell*, 167 F.3d at 569.

2. The D.C. Circuit's Analytical Approach.

In the analysis employed by the D.C. Circuit, one factual issue was of paramount importance—how much information did the government have about the existence, location, and authenticity of the subpoenaed documents[193] at the time the subpoena was issued.[194] The court refused to simply accept the Independent Counsel's assertion that the subpoenaed documents existed and were in Webster Hubbell's possession. Doing so, in the court's words, "glosses over what we consider to be an essential component of any inquiry into the testimonial value of a given act of production—the quantum of information possessed by the government before it issued the relevant subpoena."[195] The court proceeded to inquire into whether Hubbell's production of the documents had communicated any incriminating information to the government.

The Independent Counsel had advanced two arguments that no significant information was communicated and, therefore, the *Fisher* "foregone conclusion" test was satisfied. The first argument was that "the most natural reading of *Fisher* counsels against recognizing a testimonial value in the production of ordinary income, financial, and business records like those subpoenaed here" because most people possess such records and the government cannot reasonably be expected to know the details of exactly what such records a particular person possesses.[196] The D.C. Circuit rejected this argument as both resting on

193 Here it is critical to note that the D.C. Circuit was not concerned with the contents of the documents or, stated differently, the information the documents contained. It read *Fisher* as establishing that the contents—the information in the documents—was not protected by the Fifth Amendment so long as the documents were voluntarily prepared. *See id.* at 580 (faulting the district court's analysis and explaining that "[t]he inquiry should have focused on whether the government knew that the documents existed at all, and not upon whether the government knew of the information contained therein").

194 One commentator has criticized this analytical approach, asserting that the testimonial value of information should not be assessed based simply upon whether the government already possesses that information. *See* Nagareda, *supra* note 7, at 1597-99 (arguing that the government's preexisting knowledge is irrelevant to the status of being a witness against oneself; that the focus of the Fifth Amendment is a "particular method of information gathering in itself," regardless of the government's knowledge; and that the determination by a court of the government's knowledge will be difficult in practice, and will result in divergent outcomes).

195 *See Hubbell*, 167 F.3d. at 569.

196 *See id.* at 570; *see also* 1999 WL 1072535 at 33-34 (OIC brief) ("Because the subpoena in this case, like the subpoena in *Fisher*, called only for specified categories of ordinary business records, the decision in *Fisher* calls for the same conclusion here: The subpoena compelled respondent to make no communication that rises to the level of testimony within the protection of the Fifth Amendment."); 1999 WL 1076136 at 29-30 (DOJ brief) ("Thus, *Fisher*'s 'foregone conclusion' test focuses on broader categories of documents, and not on the individual documents that may fall within the specifications of a subpoena. As applied to an individual who is or was engaged in business, the test would therefore defeat any effort to invoke the Fifth Amendment to resist compliance with a subpoena for ordinary business records, such as ledgers, bank records, invoices,

flawed logic and misconstruing relevant Supreme Court precedent. The primary error in this argument, according to the court, was that it "makes the classical error in the field of logic" of assuming that future events can be accurately predicted based upon past observations.[197] The court read the relevant Supreme Court precedent as reflecting an understanding of this point of logic and therefore "requir[ing] actual knowledge rather than mere inductive generalizations."[198] The court pointed out that, in *Fisher*, the government had "precise knowledge of the existence and location" of the subpoenaed documents, and, therefore, the testimonial value of the act of production "was negligible."[199] In *Doe I*, however, the government sought a broad range of "ordinary income, financial, and business records," but the court held that the act of production "would have testimonial value meriting Fifth Amendment protection."[200] The different outcomes in those two cases demonstrated that the Supreme Court did not view the act of producing documents as being without testimonial value in all cases where ordinary business records were being produced.[201]

The D.C. Circuit opinion went on to analyze cases from other circuits that had been cited by the Independent Counsel in support of the foregone conclusion/business records argument.[202] The court read those cases as requiring the prosecution to have "first hand knowledge of the documents' existence and whereabouts"[203] before that information could

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receipts, and bills. Such documents are kept by every business, and conceding their existence therefore 'adds little or nothing to the sum total of the Government's information.'") (internal footnote and citation omitted.).

197 *See id.* at 570 (citing works on logic by philosophers David Hume and Bertrand Russell).

198 *See id.*

199 *Id.*

200 *Id.*

201 *Cf. id.* at 571 (concluding that "the fact that the subpoena [in *Doe I*] sought income, financial, and business records did not undercut the testimonial value of the act of production") (citing United States v. Doe, 465 U.S. 605, 614 n.13 (1983) [hereinafter *Doe I*]).

202 *See Hubbell*, 167 F.3d at 571-72 (analyzing *United States v. Rue*, 819 F.2d 1488 (8th Cir. 1987) and *United States v. Fishman*, 726 F.2d 125 (4th Cir. 1983)).

203 *See Hubbell*, 167 F.3d at 571 (discussing *Rue*, 819 F.2d 1488). The D.C. Circuit's analysis highlights the potential adverse consequences for targets or subjects of a criminal investigation who "cooperate" with the government's investigation during its early stages. In *Rue* the subject of the investigation, Dr. Rue, had permitted Internal Revenue Service agents to examine records relating to his dentistry practice before a grand jury subpoena for those documents was issued. *See Hubbell*, 167 F.3d at 571 (citing *Rue*, 819 F.2d at 1490). Dr. Rue had also had repeatedly admitted that certain of the records existed. *Hubbell*, 167 F.3d at 571 (citing *Rue*, 819 F.2d at 1493-94). This information voluntarily provided to the government by Dr. Rue was sufficient to meet the Fisher foregone conclusion test and, therefore, Dr. Rue had effectively (and presumably unknowingly and unintentionally) waived his Fifth Amendment act of production privilege before the grand jury subpoena had been issued. In the other case analyzed by the D.C. Circuit, *United States v. Fishman*, 726 F.2d 125 (4th Cir. 1983), another doctor was being investigated, but he apparently was somewhat less forthcoming with information about his business records. Dr. Fishman had not admitted the existence and possession of the subpoenaed records, and his "generalized reference" to the existence of a category of records did not constitute a "representation or admission" that documents falling into that category exist or are in his possession.

be considered a "foregone conclusion" and thus not protected by the privilege against self-incrimination. The court stressed that "mere conjecture" based upon assumptions about a particular kind of business[204] was not sufficient to establish that the existence and possession of subpoenaed documents is a foregone conclusion.[205]

The D.C. Circuit also rejected the Independent Counsel's second foregone conclusion argument—that the prosecutors already had enough information about the existence and Hubbell's possession of the subpoenaed documents from other sources (*i.e.*, Hubbell's statements about his consulting work in congressional testimony, information in a report prepared by the Department of Transportation Inspector General's office, and the Independent Counsel's prior investigation of Hubbell's work at the Rose Law Firm). In the court's view, "[these] snippets of information do not come close to establishing the existence of the myriad of documents sought through the subpoena."[206] The court concluded that in order to meet the Fisher foregone conclusion test, the Independent Counsel would have to "establish its knowledge [of the existence and location of the subpoenaed documents] with a greater degree of specificity" than assumptions based on general information about Hubbell's business activities.[207] As the quoted statements suggest, the court was laying the groundwork for holding the government to a higher standard of knowledge about the subpoenaed documents to meet the

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See Hubbell, 167 F.3d at 571 (citing *Fishman*, 726 F.2d at 127 n.4). The implications of this dichotomy—a witness who cooperates in *Rue* and is held to have waived his privilege versus a less cooperative witness in *Fishman*, who is held to have retained his privilege—has implications for law enforcement that are almost as significant as the *Fisher/Doe* continuum discussed above. The practical effect of this distinction will be that any witness who has the benefit of informed legal counsel will refuse to volunteer any information to government investigators at any stage of an investigation because to do otherwise risks waiving the act of production privilege. *Cf.* Melissa D. Shalit, *Audit Inquiry Letters and Discovery: Protection Based on Compulsion*, 15 CARDOZO L. REV. 1263, 1275 (1994) (discussing waiver of attorney-client and work product privileges); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 153 n.31 (2000) (discussing waiver of attorney-client privilege). Finally, it is noteworthy that the case that the D.C. Circuit relied upon most directly in its *Hubbell* analysis, In re *Grand Jury Subpoena Duces Tecum*, 1 F.3d 87 (2d Cir. 1993), cooperation with a government investigation (in that case a Securities and Exchange Commission investigation) also resulted in a waiver of the Fifth Amendment act of production privilege. *See id.* at 93 ("Since Doe produced a copy of the calendar to the SEC and testified about his possession and use of it, its existence and location are 'foregone conclusion[s],' and his production of the original 'adds little or nothing to the sum total of the Government's information.'") (alteration in original and citation omitted).

204 The Independent Counsel argued that "[g]iven the nature of Hubbell's consulting work . . . it [was] a foregone conclusion at the time of the subpoena that authentic business records existed and were in Hubbell's possession." *Hubbell*, 167 F.3d at 571 n.25.

205 *Id.* at 571.

206 *Id.* at 572.

207 *Id.*

foregone conclusion test as to existence and possession.[208] The D.C. Circuit's analysis of this argument put forth by the Independent Counsel also underscores the risk of voluntarily sharing information with government investigators because doing so will significantly enhance the likelihood that prosecutors can meet the foregone conclusion test.[209] The remaining and critical question was precisely what "degree of prior knowledge [is] needed to render the existence, possession or authenticity of documents a foregone conclusion."[210] To answer that question, the court found it "necessary to return to first principles."[211]

These "first principles" were that after the "act of production trilogy" of *Fisher*, *Doe I*, and *Braswell*, the Fifth Amendment privilege against self-incrimination applies only to compelled communication of incriminating information—that is, "compelled truthtelling."[212] The D.C. Circuit described this "anti-extortion principle" as "the motivating force of self-incrimination doctrine."[213] The court also relied on this analytical device to distinguish the *Holt*[214]-*Schmerber*[215]-*Gilbert*[216]-*Wade*[217] line of "compelled physical evidence" cases.[218] Although those cases involve compulsion that resulted in the government obtaining significant incriminating information from witnesses, the Fifth Amendment privilege against self-incrimination is not implicated because "the government has no need to rely upon the witness's truthtelling to secure the evidence it needs."[219] In other words, the witness is not compelled to use his or her mind to provide truthful testimony.[220] The compelled act of producing

208 *See infra* Part III.A. (comparing the Fourth Amendment particularity requirement for obtaining a search warrant to the post-*Hubbell* Fifth Amendment requirements for overcoming act of production use immunity).

209 *See supra* note 203.

210 *Hubbell*, 167 F.3d at 572.

211 *Id.* (citing *Doe II*'s description of *Fisher* and *Doe I* as "applying basic Fifth Amendment principles").

212 *See Hubbell*, 167 F.3d at 575. Webster Hubbell's counsel emphasized this "compelled truthtelling" approach to fifth amendment analysis at oral argument in the Supreme Court, *see* 2000 WL 230520 at 28, but the Court did not rely on this approach in its opinion, *see infra* Part II.B. (discussing the Court's analysis in *Hubbell*).

213 *Hubbell*, 167 F.3d at 575.

214 Holt v. United States, 218 U.S. 245 (1910) (containing the seminal analysis of the application of the Fifth Amendment to physical/bodily evidence in which Justice Holmes concluded that forcing a defendant to wear a "blouse" worn in a murder for which he was being tried was not a compelled communication protected by the fifth amendment).

215 Schmerber v. California, 384 U.S. 757 (1966) (holding that the Fifth Amendment privilege against self-incrimination does not apply to compelling a witness to provide a blood sample).

216 Gilbert v. California, 388 U.S. 263 (1967) (holding that the Fifth Amendment privilege against self-incrimination does not apply to compelling a witness to provide a handwriting exemplar).

217 United States v. Wade, 388 U.S. 218 (1967) (holding that the Fifth Amendment privilege against self-incrimination does not apply to compelling a witness to provide a voice exemplar).

218 *See Hubbell*, 167 F.3d at 572-75 (discussing the compelled physical evidence cases).

219 *Id.* at 574.

220 *Cf. id.* at 575 (discussing the "focus upon whether the state operates upon a reluctant witness's mental faculties to compel testimony").

documents, in contrast, may be an extortion of truthful information concerning the "four potential statements that adhere to the act of production—existence, possession, authenticity, and the belief that the produced documents match the subpoena's terms."[221]

3. The D.C. Circuit's Testimonial Value Test.

Having established the two foundations of its Fifth Amendment foregone conclusion[222] analysis—(i) the extent to which the government already possesses information about the existence, location, and authenticity of the subpoenaed documents at the time the subpoena was issued,[223] and (ii) the degree to which the government is relying upon compelled truthtelling by the witness to obtain information,[224]—the court set out the legal standard for "assessing the testimonial value of an act of production."[225] The court formulated its standard as follows:

> In light of *Fisher*, *Doe I*, and *Doe II*, we conclude that the testimonial value varies directly with the quantum of information that the government seeks to extract through compelling the expression of the contents of an individual's mind and inversely with the quantum of information in the government's possession at the time the relevant subpoena issues.[226]

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221 *See id.*

222 The court was very precise in its dissection of the various aspects of Fifth Amendment analysis. It distinguished analysis of "the testimonial value" of the act of producing documents from "the question of whether the act of producing documents in response to a subpoena is testimonial." *Id.* at 576 n.31 ("The foregone conclusion analysis, which examines the testimonial value of the accuseds' act of production, has nothing to do with the general question of whether the act of producing documents in response to a subpoena is testimonial. *Fisher*, *Doe I*, and *Braswell* all teach that it is.").

223 *See supra* text accompanying notes 193-201.

224 *See supra* text accompanying notes 212-21.

225 *Hubbell*, 167 F.3d at 575.

226 *Id.* (footnote omitted). The court's footnote to this statement added the following point:

> The former constitutes the more important formulation, as it ties testimonial value directly to the disparity between the government's knowledge and that of the subpoenaed party. It focuses directly upon the government's need to access the contents of an individual's mind. By contrast, although the government may have little information with respect to whether a suspect's DNA or fingerprints match those of a suspected culprit, and the government will extract a great deal of information from a blood sample or a handwriting exemplar, neither probes the contents of one's mind to compel testimony. Everything of evidentiary value traces to the body as a source "real," as opposed to communicative, evidence.

Id. at n.30. This footnote emphasized the importance to the court's analysis of the amount of information the government has about the existence and location of the subpoenaed documents, an analytical approach that Professor Nagareda has criticized as inappropriate for a Fifth Amendment analysis. *See supra* note 194.

This standard has two important qualities. First, it is consistent with *Fisher*'s admonition that the act of production doctrine should be applied based upon "the facts and circumstances of particular cases or classes thereof."[227] Second, and consistent with the *Fisher* "facts and circumstances" approach, it necessitates a careful review by the court of the knowledge the government has at the time the subpoena is issued.[228] Not surprisingly, the D.C. Circuit concluded that this approach forecloses any analysis of whether a particular act of production has testimonial value based upon categories of information.[229] Rather than simply defining categories of information and then asserting that some documents within those categories must exist—an approach the Independent Counsel proposed and the D.C. Circuit rejected as "hing[ing] on tautology"[230]—a more precise judicial inquiry is required. This left the D.C. Circuit facing the task that the Supreme Court has appeared to want to avoid since deciding *Fisher*:[231] articulating a test for when an act of production of documents has sufficient testimonial value to merit Fifth Amendment protection.

The D.C. Circuit did not shrink from this task. It also did not hide behind vague, "metaphysical"[232] concepts. The test it announced was firmly grounded in an established legal concept ("reasonable particularity") and was consistent with the approach taken by a sister circuit:

> Recognizing that the inquiry will always be highly contextual and fact-intensive, we agree with the Second Circuit that the government must establish its knowledge of the existence, possession, and authenticity of the subpoenaed documents with "reasonable particularity" before the communication inherent in the act of production can be considered a foregone conclusion.[233]

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227 *See* Fisher v. United States, 425 U.S. 391, 410 (1976).

228 *Cf. Hubbell*, 167 F.3d at 578 (employing the heading "Assessing the Government's Knowledge" for the court's analysis of "the extent of the knowledge that the government must have in order to justify a conclusion that the communicative aspects of the act of production are a 'foregone conclusion'").

229 *See id.* On this point the court looked beyond traditional legal authorities for support, turning to scholarship in philosophy for explanation of the limitations inherent in the use of categories to define specific information. *See id.* (citing LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 3d ed. 1968)).

230 *Hubbell*, 167 F.3d at 579.

231 *See supra* Part I.B.4. (discussing the Supreme Court's failure to articulate a test or provide other meaningful guidance to the lower courts as to when an act of production of documents is sufficiently testimonial to merit Fifth Amendment protection).

232 Alito, *supra* note 8, at 59; *see also Hubbell*, 167 F.3d at 579 n.34, 601 (Williams, Cir. J., dissenting).

233 *Hubbell*, 167 F.3d at 579 (citing *In re* Grand Jury Subpoena Duces Tecum, 1 F.3d 87, 93 (2d Cir. 1993)).

This test is clear[234]—courts and litigants know what "reasonable particularity" means—and it places an appropriately heavy burden[235] on the government in overcoming the assertion of a Fifth Amendment privilege for the act of producing documents, as evidenced by the D.C. Circuit's application of its test in the *Hubbell* case.

4. Application of the D.C. Circuit's Testimonial Value Test in *Hubbell.*

In applying this test to the *Hubbell* case, the D.C. Circuit provided guidance as to the care and precision with which a court must assess "the extent of the government's knowledge as to the existence, possession or control, and authenticity of the subpoenaed documents—*i.e.*, the testimonial components of the act of production."[236] The court pointed out that this inquiry differs from the "conceptually separate and temporally subsequent *Kastigar* inquiry,"[237] a point that the district court had failed to recognize in its analysis of the case. The district court had "improperly conflated" the two inquiries by including the content of the documents,[238] as opposed to their existence and location, in its act of production analysis.[239]

This point merits careful consideration because the D.C. Circuit in *Hubbell* employed a far more precisely calibrated approach to Fifth Amendment analysis than any other post-*Fisher* judicial decision. Under the D.C. Circuit approach, two separate and independent inquiries must be undertaken by a court when a witness asserts the Fifth Amendment privilege against self-incrimination for a production of documents and is subsequently immunized and compelled to product those documents. The first analysis, which the court called "the *Fisher/Doe I* inquiry," assesses whether the act of producing documents "[has] sufficient testimonial value to invoke the Fifth Amendment's protections."[240] To use the terminology of *Fisher*, this inquiry will determine whether or not the

234 *See Hubbell*, 167 F.3d at 579 n.34 (disputing the dissenting judge's assertion that the majority's test would "largely turn on district courts' discretion in this metaphysical classification of prosecutors' knowledge").

235 *See generally* JOHN M. BURKHOFF, SEARCH WARRANT LAW DESKBOOK, §§ 9.1, 9.5 (West 1997) (discussing the constitutional particularity requirement for search warrant descriptions of "things to be seized" and the application of that requirement to documentary evidence).

236 *Hubbell*, 167 F.3d at 580.

237 *Id.*

238 As the D.C. Circuit explained, "The [district court's] inquiry should have focused upon whether the government knew that the documents existed at all, and not upon whether the government knew of the existence of the information contained therein." *Id.*

239 *See id.*

240 *Id.*

existence and location of the subpoenaed documents is a "foregone conclusion"; if so, then the act of production is not protected by the Fifth Amendment. The focus of this inquiry is what the government knows at the time the subpoena is issued about the documents (or other subpoenaed materials) that are in the possession or under the control of the witness.[241] In this inquiry, the burden is on the prosecution to "demonstrat[e] with reasonable particularity a prior awareness" that the subpoenaed documents existed and were in the possession or control of the witness.[242] The D.C. Circuit's opinion makes clear that it is not sufficient to have a general belief that a witness possesses a particular category of documents; [243] the government must show it knew that particular documents existed and were in a particular location prior to issuance of the subpoena, as was the case in *Fisher*, in order to meet the foregone conclusion test.[244]

The key to this aspect of the D.C. Circuit's Fifth Amendment analysis is an understanding that the "reasonable particularity" test is unrelated to the *Kastigar* use and derivative use immunity test,[245] which must be satisfied before a witness can be prosecuted after being granted immunity.[246] The reasonable particularity test is concerned only with a comparison between the factual circumstances at the time the subpoena is issued and those that exist at the time of the witness's act of production; the test compares what the government "knew" when it issued the subpoena to what it "learned" from the witness's act of production. If the government "learns" information from the act of production itself, then the Fifth Amendment is implicated, and the witness cannot be compelled to produce the subpoenaed documents without a grant of immunity. In this manner, the "reasonable particularity" test precedes the immunity grant (as well as the *Kastigar* analysis that is required if the government seeks to prosecute an immunized witness), and as a practical matter, actually applies to the question of whether or not the prosecution must seek an immunity order to compel a witness to comply with a subpoena.[247] If the government can meet the reasonable particularity test

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241 *See id.* at 581.

242 *Id.*

243 *See id.* at 578-79.

244 *See id.* at 581.

245 *See supra* notes 237-39 and accompanying text.

246 The effect of Hubbell's immunity grant is discussed at *infra* Part II.B.2.

247 In this regard, the "reasonable particularity" test is most like the question of whether or not a particular testimonial response (whether in the form of testimony or production of documents or other tangible evidence) is sufficiently incriminating to implicate the protections of the Fifth Amendment. The D.C. Circuit addressed this issue in a separate subsection of its *Hubbell* opinion. *See Hubbell*, 167 F.3d at 581-82. The court applied the test from *Hoffman v. United States*, 341 U.S. 479 (1951), noting that "[w]ith respect to a subpoena for documents, the privilege cannot be invoked merely because the subpoenaed items contain incriminating information; the act of

by showing that the particular documents (but not general categories of documents)[248] exist and are in the possession or control of the witness, then the act of production does not have sufficient testimonial value to warrant Fifth Amendment protection. In that case, the witness need not be granted immunity, and instead the court presumably should grant a prosecution motion to compel compliance with the subpoena if the witness refuses to produce the subpoenaed documents.

5. The Effect of the Immunity Grant in *Hubbell.*

In the *Hubbell* case, the Office of Independent Counsel had already sought and obtained an immunity order, and had then used the information contained in the subpoenaed documents to prepare an indictment against Hubbell.[249] The indictment of the witness who had produced documents under a grant of act of production use and derivative use immunity required the D.C. Circuit to address the application of the *Kastigar* test to the situation.[250] In its assessment, the court emphasized that, under *Kastigar*, "a grant of immunity must provide protection commensurate with that afforded by the privilege, [although] it need not be broader."[251] In applying this teaching the D.C. Circuit made its second major contribution to Fifth Amendment jurisprudence.

In its *Kastigar* analysis, the D.C. Circuit addressed a conceptual argument that had been proposed in a 1986 law review article[252] written by the Department of Justice prosecutor who had argued and lost the *Doe I* case[253] before the Supreme Court. This argument, in a nutshell, is that

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production must communicate and incriminate." *Hubbell*, 167 F.3d at 581. The court compared the Hubbell subpoena to the one issued in *Doe I*, where the witness's act of production would tacitly admit the documents' existence and his control over them, and could provide a source of authentication, and, therefore, was incriminating. *See id.* at 581-82. The court concluded that "Hubbell faced a real and substantial threat of incrimination in responding" to the subpoena, but left it to the district court to determine on remand "to what extent that testimony is incriminating." *Id.* at 582. Thus both the reasonable particularity test and the *Hoffman* incrimination test apply at the time a fifth amendment act of production privilege is asserted, and only if both of those tests are resolved in favor of the witness is an immunity grant necessary to compel production of the subpoenaed documents. If the government can prevail on either of these tests, then presumably the court should grant a motion to compel by the government and require compliance with the subpoena without any grant of immunity.

248 *See supra* notes 242-44 and accompanying text.

249 *See Hubbell*, 167 F.3d at 565.

250 *See id.* at 582-85.

251 *Id.* at 583 (citing Kastigar v. United States, 406 U.S. 441, 453 (1972)) (alteration in original).

252 *See* Alito, *supra* note 8, at 59-60 (suggesting that one "envision the records materializing in the grand jury room as if by magic"); *see also Hubbell*, 167 F.3d at 602 (Williams, Cir. .J., dissenting); Greg Sergienko, United States v. Hubbell*: Encryption and the Discovery of Documents*, 7 RICH. J.L. & TECH. 31 (2001).

253 *See* United States v. Doe, 465 U.S. 605, 606 (1986) ("Samuel A. Alito, Jr., argued the case for the United States.").

the requirements of *Kastigar* are satisfied in an act of production immunity case so long as the government acts as if "the documents in question just appeared on it doorstep."[254] Under this approach, the prosecution can make no reference at trial as to how or by whom the documents were produced, but it can make full use of both the documents themselves and the information they contain.[255] The D.C. Circuit firmly and categorically rejected this "manna from heaven"[256] argument as "essentially eviscerat[ing] the act of production doctrine, as well as the Fifth Amendment protection it secures."[257]

In rejecting the "manna from heaven" argument, the court focused on the government's knowledge of existence and possession of the subpoenaed documents. In cases where the government has little or no information about the existence or possession of the documents at the time the subpoena is issued, the magical appearance hypothetical does not account for all the information communicated to the government by the act of production. The court analogized to a hypothetical case in which all the residents of a large apartment building where a murder victim had been stabbed to death are granted act of production immunity and compelled to produce all knives in their possession or control.[258] A knife produced by one of the immunized residents proves to be the murder weapon, and the government seeks to use the knife, as well as fingerprints and traces of blood on the knife, to prosecute its owner. In that situation, "where the government had no evidentiary knowledge independent of that derived, directly and indirectly, from testimony communicated through compelled production, *Fisher*, *Doe I*, *Doe II*, *Kastigar*, and *Braswell* clearly repudiate any attempt" to use the knife, blood, or fingerprints to prosecute the owner.[259]

The D.C. Circuit's strong rejection of the manna from heaven argument is one of two very significant contributions of its *Hubbell* opinion to the "abstract and under-determined area of law"[260] that is the post-*Fisher* act of production doctrine. The other contribution is the "reasonable particularity" test, which at last provides a yardstick for measuring whether an act of production of documents has sufficient testimonial value to be protected by the Fifth Amendment (as was the

254 *See Hubbell*, 167 F.3d at 583.

255 *Id.* ("Provided that the government does not mention the mechanics through which it obtained those documents, and that the documents are sufficiently self-explanatory and self-referential to establish their own nexus with the defendant, the government would be free to use the subpoenaed documents in making its case against the defendant.") (footnote omitted).

256 *Id.* at 585.

257 *Id.* at 583.

258 *See id.* at 584.

259 *Id.* at 584.

260 *Id.* at 570.

case in *Doe I*) or, alternatively, only communicates information that is a "foregone conclusion" and, therefore, not protected (as was the case in *Fisher*). Although the D.C. Circuit is to be commended for answering these two important questions, which the Supreme Court might be said to have studiously avoided addressing for decades, its *Hubbell* opinion is not the last word on the subject. An evaluation of the significance of the D.C. Circuit's answers to these important questions requires a careful analysis of the Supreme Court's opinion affirming the D.C. Circuit's decision in *Hubbell*.

B. The Supreme Court's Analysis in *Hubbell*.

Like the D.C. Circuit, the Supreme Court focused on the effect of the immunity grant as the key analytical factor in the *Hubbell* case.[261] Before addressing the immunity issue, the Court distinguished the *Holt-Schmerber-Gilbert-Wade* line of "physical characteristics" cases[262] and the line of cases involving required compliance with a regulatory reporting requirement.[263] The Court also acknowledged that under *Fisher* and *Doe I* a witness cannot refuse to produce subpoenaed documents "merely because the demanded documents contain[] incriminating evidence, whether written by others or voluntarily prepared by himself."[264] The Court then turned to the more difficult question of whether an act of

261 *See* United States v. Hubbell, 530 U.S. 27, 33 (2000) ("[W]e granted the Independent Counsel's petition for a writ of certiorari in order to determine the precise scope of a grant of immunity with respect to the production of documents in response to a subpoena."); *see also supra* notes 170-79 and accompanying text (noting that the immunity grant distinguished *Hubbell* from *Fisher* and *Doe I* and necessitated more detailed analysis of the consequences of the act of producing documents in response to a subpoena).

262 *See Hubbell*, 530 U.S. at 35 (citing Pennsylvania v. Muniz, 496 U.S. 582, 594-98 (1990)) (proposing that "[t]he act of exhibiting such physical characteristics is not the same as a sworn communication by a witness that relates either express or implied assertions of fact or belief"); *see also* 2000 WL 230520 at 32 (John W. Nields, Jr., Esq., oral argument on behalf of respondent Hubbell) (distinguishing the *Schmerber* blood sample, as well as the voice and handwriting exemplar cases and stating that "the point about *Schmerber* is that the witness there could be the biggest liar or the biggest truth-teller in the world, and the Government will get the same blood. It is not relying on the truth-telling of the person at all"). For conflicting views of the significance of *Schmerber* and the Supreme Court's other physical characteristics cases, compare Amar & Lettow, *supra* note 28, at 883-889 and Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 956-68 (1995).

263 *Hubbell*, 530 U.S. at 35 (citing United States v. Sullivan, 274 U.S. 259 (1927); Shapiro v. United States, 335 U.S. 1 (1948); California v. Byers, 402 U.S. 424 (1971); Baltimore City Dept. of Soc. Servs. v. Bouknight, 493 U.S. 549 (1990)). For a critical analysis of the required records cases, see Amar & Lettow, *supra* note 28, at 869-73.

264 *Hubbell*, 530 U.S. at 36.

production has "a compelled testimonial aspect"[265] that is protected by the Fifth Amendment.[266]

1. The Court Again Declines to Articulate a Testimonial Value Test.

Unlike the D.C. Circuit, however, the Supreme Court made no effort to provide a test of general application for whether a particular act of production of documents is sufficiently testimonial in nature to be protected by the Fifth Amendment. As in *Fisher* and its other act of production cases,[267] the Court focused only on the facts of the case before it. Also unlike the D.C. Circuit, the Supreme Court appears to have been unconcerned with the need to distinguish the act of production analysis from what the D.C. Circuit called "the conceptually separate and temporally subsequent *Kastigar* inquiry."[268] Instead, the Supreme Court discussed Hubbell's act of production immunity[269] before it addressed whether Hubbell's act of production was testimonial in nature.[270] The Court reviewed the nature and scope of use and derivative use immunity,[271] and emphasized the "affirmative duty [imposed] on the prosecution" to demonstrate that all the evidence to be used against the accused was "derived from a legitimate source wholly independent of the compelled testimony."[272] Only after framing the issue in terms of the immunity grant and its consequences did the court address what it identified as "the disagreement between the parties" in *Hubbell*: the significance of the testimonial aspect of the act of production.[273]

In sharp contrast to the D.C. Circuit's lengthy and theoretical *Hubbell* opinion,[274] the Supreme Court employed a practical, common-sense analysis to gauge the testimonial value of Hubbell's act of producing the subpoenaed documents. The Court first looked at the text

265 *See id.*

266 The Court also recognized that under *Hoffman v. United States*, 341 U.S. 479 (1951), the Fifth Amendment protects against compelled communication of any information that would furnish a link in the chain of evidence needed to prosecute the witness. *Hubbell*, 530 U.S. at 38. Any compelled testimony "that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory." *Id.* (quoting Doe v. United States, 487 U.S. 201, 208 n.6 (1988)).

267 *See Bouknight*, 493 U.S. at 554-56; United States v. Doe, 465 U.S. 605, 613-14 (1984).

268 *See generally* United States v. Hubbell, 167 F.3d 552, 580 (1999), *aff'd.*, 530 U.S. 27, 46 (2000).

269 The immunity grant is discussed in Part III of the Court's opinion, *Hubbell*, 530 U.S. at 38-40.

270 The nature of Hubbell's act of production and the possible application of the *Fisher* "foregone conclusion" doctrine are discussed in Part IV of the Court's opinion, *id.* at 40-46.

271 *See id.* at 44-45 (discussing use and derivative use immunity in greater detail).

272 *Id.* at 40 (quoting Kastigar v. United States, 406 U.S. 441, 460 (1972)).

273 *Hubbell*, 530 U.S. at 40.

274 United States v. Hubbell, 167 F.3d 552 (1999), *aff'd.*, 530 U.S. 27, 46 (2000).

of the subpoena itself.[275] It was clear to the Court that the prosecution needed Hubbell's assistance "both to identify potential sources of information and to produce those sources."[276] The Court emphasized the breadth of the description of the eleven categories of information sought by the subpoena and compared Hubbell's efforts in identifying and producing the large volume of documents responsive to a general category set out in the "Subpoena Rider" to answering either a detailed written interrogatory or a series of oral questions at a discovery deposition.[277] The Court was careful, however, to distinguish between the information that Hubbell had provided through the act of producing the documents, on the one hand, and the information that the contents of those documents provided, on the other hand. "Entirely apart from the contents . . . providing a catalog of existing documents" in response to the categories sought in the subpoena had sufficient testimonial value for Hubbell to invoke the protections of the Fifth Amendment.[278]

2. Implications of the Supreme Court's Decision in *Hubbell*.

This aspect of the Court's *Hubbell* analysis alone is noteworthy for what it portends for future use of grand jury subpoenas duces tecum to obtain documents and other physical evidence from targets and subjects of investigations. The subpoena directed to Webster Hubbell was hardly unique in either its breadth of categories of documents sought or the generality of the description of those categories. To the contrary, the terms "any and all documents," "reflecting, referring, or relating," "direct or indirect," "including but not limited to," and the like are standard boilerplate subpoena language. These extremely broad and all-inclusive terms are routinely applied to numerous categories of business and financial documents and records in white collar criminal investigations. The quantity of documents (13,120 pages) that Hubbell produced in response to the subpoena also does not distinguish his case from many other grand jury investigations; witnesses routinely produce large quantities of documents in white collar criminal investigations.

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275 *See Hubbell*, 530 U.S. at 41. The importance of the text of the subpoena to the Court's analysis is demonstrated by the fact that the Court chose to publish as an appendix to its opinion the entire text of the "Subpoena Rider" that describes the eleven categories of documents Hubbell was required to produce. *See id.* at 46-49.

276 *See id.* at 41.

277 *See id.* at 41-42. The Court illustrated this point by referring to the category from the subpoena rider calling for the production of "any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to" Hubbell or his family members during a three-year period. *See id.* at 41 (quoting from category A of the Subpoena Rider attached as Appendix to the Opinion of the Court, *id.* at 46).

278 *See id.* at 42.

Finally, the Court's conclusion that identifying and producing the documents "fitting within any of the 11 broadly worded subpoena categories" [279] has testimonial value would remain true even if the subpoena called for only a single category. [280] The point of these observations has enormous ramifications—a witness can assert the act of production privilege in response to the kind of grand jury subpoena duces tecum that is routinely used in white collar criminal investigations.

The Court's analysis in *Hubbell* confirms this point. The Court rejected the government's "manna from heaven" [281] argument and emphasized the "truth-telling" involved in responding to the subpoena.[282] In recognizing the truth-telling that is inherent in the act of producing documents in response to a subpoena, Justice Stevens returned to the strongbox key/wall safe combination analogy he first suggested twelve years earlier in his *Doe II* dissent. [283] In *Hubbell*, however, Justice Stevens was writing for the majority, and he used the opportunity to dismiss the government's efforts to use his strongbox key/wall safe combination analogy to minimize the protection afforded by the act of production doctrine.[284] The *Hubbell* opinion makes it crystal-clear that, contrary to the government's assertions, "[t]he assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox."[285] Thus the court effectively dismissed both the "manna from heaven" and the "strongbox key" arguments and recognized that production of documents

279 *Id.*

280 Although an obvious point, it merits emphasis that the Fifth Amendment problem presented by the subpoena directed to Hubbell, with its eleven categories of documents, cannot be solved by simply issuing eleven separate subpoenas each calling for one category of information. The mental effort, which has been described as "the functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery deposition," required to identify and produce the particular documents that are responsive to a given category is the same in both cases. *See id.* at 41-42.

281 *Id.* at 42.

282 *Id.* The Court cited Professor Stuntz's article, *Self-incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1228-29, 1256-59, 1277-79 (1988), as "discussing the conceptual link between truth-telling and the privilege in the document production context," and JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2264 at 379 (J. McNaughton rev. 1961), as "describing a subpoena *duces tecum* as 'process relying on [the witness'] [sic] moral responsibility for truthtelling.'" *Hubbell*, 530 U.S. at 42 n.23.

283 *Hubbell*, 530 U.S. at 43 (citing Doe v. United States, 487 U.S. 201, 210 n.9). Justice Stevens used the strongbox key/wall safe combination analogy in his *Doe II* dissent, *see id.* at 219, and the *Doe II* majority responded in the note Justice Stevens cites in *Hubbell*, *see id.* at 210 n.9.

284 *See* 2000 WL 230520 at 8 (U.S. Oral Argument of Ronald J. Mann) ("If what we do is we tell the defendant give us the key to the strong box, it's full of incriminating documents, the answer is he has to give us the key. If we tell him, tell us the combination to the safe, we can't make him do that.").

285 *See Hubbell*, 530 U.S. at 43.

in response to a subpoena requires both "mental and physical steps"[286] and "truth-telling"[287] by the witness.

This recognition of the "truth-telling" inherent in responding to a subpoena duces tecum suggests an even broader potential application of the act of production privilege: The same truth-telling is required whether the witness is producing thousands of pages of documents, as in the *Hubbell* case, or a single, one-page document specifically described in a subpoena. In both instances, the government relies on the truth-telling of the witness to admit the existence of the document(s) and produce the document(s) in response to the subpoena. The testimonial nature of the act of production is the same in both cases, and, arguably, the privilege against self-incrimination should apply to the act of production in both cases.

The difference between the two cases, if any, arises out of the application of the "foregone conclusion" doctrine.[288] If the government can show that existence, possession, and authenticity are a foregone conclusion, then the witness's assertion of the Fifth Amendment privilege against self-incrimination can be overridden and the production can be compelled without a grant of immunity. The D.C. Circuit's "reasonable particularity" test in its *Hubbell* opinion provides a means of applying the foregone conclusion doctrine.[289] It clearly will be easier for the government to meet the reasonable particularity test in the single document case, as opposed to the broad categories of documents case, but in both instances the burden is on the government to present evidence that the document(s) sought exists and is in the possession of the witness.[290]

Up to this point in its opinion, the *Hubbell* Court had gone quite far in clarifying Fifth Amendment doctrine. It had rejected the government's assertion that a "manna from heaven" approach could be used to allow the government to make use of the contents of documents so long as the act of production itself is not introduced into evidence at trial.[291] It also had made clear that selection of documents that fit a general category described in a subpoena is testimonial in nature because it requires a "truthful reply" by the witness.[292] As such, it is not "a mere physical act that is principally non-testimonial in character" and is "like telling an inquisitor the combination to a wall safe, not like being forced

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286 *See id.* at 42.

287 *See id.* at n.23.

288 *See infra* notes 291-94 and accompanying text.

289 *See* United States v. Hubbell, 167 F.3d 552, 579-80 (1999), *aff'd.*, 530 U.S. 27 (2000).

290 *See id.* at 581 (citing Kastigar v. United States, 406 U.S. 441, 461-62 (1972); Braswell v. United States, 487 U.S. 99, 117 (1988)).

291 *Hubbell*, 530 U.S. at 42.

292 *Id.*

to surrender the key to a strongbox."[293] These points resolve significant uncertainties in the application of the Fifth Amendment to document subpoenas. Unfortunately, however, on the most difficult and uncertain point—the question of when the foregone conclusion doctrine applies to an act of production of documents—the Court once again declined to provide a definitive answer.

In addressing the foregone conclusion issue, the Court reverted to the approach it had taken in *Fisher* and *Doe I*, deciding the case based upon the facts before the Court without articulating any more general test for application in future cases. The Independent Counsel had argued for a per se rule that the production of "ordinary business records" is never sufficiently testimonial to warrant Fifth Amendment protection because "the existence and possession of such records by any businessman is a 'foregone conclusion' under *Fisher*."[294] The Court rejected this argument as misreading *Fisher* and ignoring *Doe I*.[295] While the Court declined to define "the scope of this 'foregone conclusion' rationale," it concluded that "the facts of this case plainly fall outside of it."[296] The reasoning behind that conclusion is considerably more succinct than that of the D.C. Circuit in its *Hubbell* opinion, and although the opinion stops short of explicitly adopting the "reasonable particularity" test put forward by the D.C. Circuit, it nonetheless is sufficient to answer the most important question about the foregone conclusion doctrine.

The Court decided that the foregone conclusion did not apply in the *Hubbell* case by comparing the facts of that case to the facts of *Fisher*. In *Fisher*, the government knew or could confirm the location and existence of the subpoenaed documents without any assistance from the individual who was asserting a Fifth Amendment privilege with respect to the documents. The facts of *Hubbell* were different. In what may well be the most important sentence of the *Hubbell* opinion, the Court identified the crucial difference: "here the Government has not shown that it had any prior knowledge of either the existence or the whereabouts

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293 *Id.*

294 *Id.* at 44 (citing Fisher v. United States, 425 U.S. 391, 411 (1976)); *see also* 1999 WL 1072535 at 33-34 (OIC brief) ("Because the subpoena in this case, like the subpoena in *Fisher*, called only for specified categories of ordinary business records, the decision in *Fisher* calls for the same conclusion here: The subpoena compelled respondent to make no communication that rises to the level of testimony within the protection of the Fifth Amendment."); 1999 WL 1076136 at 29 (DOJ amicus brief) ("Thus, *Fisher*'s 'foregone conclusion' test focuses on broader categories of documents, and not on the individual documents that may fall within the specifications of a subpoena. As applied to an individual who is or was engaged in business, the test would therefore defeat any effort to invoke the Fifth Amendment to resist compliance with a subpoena for ordinary business records . . . .").

295 *See Hubbell*, 530 U.S. at 44.

296 *Id.*

of the 13,120 pages of documents ultimately produced by respondent."[297] By recognizing the extent of the Government's prior knowledge as the critical inquiry for purposes of the application of the foregone conclusion doctrine, the Court effectively resolved the issue of when that doctrine should apply.

Although the Court did not adopt "reasonable particularity" as the general standard for assessing the adequacy of the government's prior knowledge, it at least made clear that it is the extent of that knowledge that a court must weigh when deciding whether the foregone conclusion test is applicable. In cases like *Hubbell*, where the government cannot show "that it had any prior knowledge of either the existence or the whereabouts"[298] of the subpoenaed documents, the foregone conclusion doctrine applies, and the witness can assert the Fifth Amendment act of production privilege and refuse to produce the subpoenaed documents. If the government wishes to overcome the witness's Fifth Amendment privilege, it must grant the witness act of production immunity. If the government thereafter indicts the witness, it must be prepared to "prove that the evidence it used in obtaining the indictment and propose[s] to use at trial was derived from legitimate sources 'wholly independent' of the testimonial aspect of respondent's immunized conduct in assembling and producing the documents described in the subpoena."[299] Consistent with the D.C. Circuit's analysis,[300] this process as described by the Supreme Court puts a heavy burden on the government at two distinct points: (1) the initial showing that the foregone conclusion doctrine applies, through demonstrating prior knowledge of the existence, location, and authenticity of the particular documents (not categories of documents), and (2) the subsequent *Kastigar* showing that all evidence used in obtaining the indictment and proposed to be used at trial was obtained from independent sources and was not in any way derived from the witness's immunized act of production.

As discussed in Part V below, the Court's affirmance of these two points raises important questions about the continued vitality and significance of the *Fisher* "contents vs. act of production" distinction. The *Hubbell* opinion will also have a major effect on the government's ability to obtain documents and other physical evidence from subjects and targets of grand jury investigations. In the post-*Hubbell* era, it is no

297 *Id.*

298 *Id.* at 45.

299 *See id.*

300 *See* United States v. Hubbell, 167 F.3d 552, 580 (1999), *aff'd.*, 530 U.S. 27 (2000) ("However, when articulating these factual findings as to the Independent Counsel's knowledge of the documents' existence—as is proper under *Fisher* and *Doe I*—the district court improperly conflated this *Fisher/Doe I* inquiry with the conceptually separate and temporally subsequent *Kastigar* inquiry.").

longer clear that a grand jury subpoena is an easier means of obtaining evidence than a search warrant for prosecutors investigating white-collar crime. This issue is addressed in Part IV, before turning to the broader theoretical implications of the *Hubbell* decision.

IV. Post-*Hubbell* Comparison of Search Warrants and Grand Jury Subpoenas as Means of Obtaining Documents in Criminal Investigations.

Parts II and III above describe the decline of *Boyd* and the development of the act of production doctrine from *Fisher* through *Hubbell*. The Supreme Court's decision in *Hubbell*, with its clear rejection of the prosecution's arguments for a limited interpretation of the testimonial value of the act of producing documents in response to a subpoena, invites a re-examination of *Boyd* and *Fisher*. The *Boyd* decision has been widely criticized in the years since *Fisher* introduced the testimonial communications analysis and the act of production doctrine. Both courts [301] and commentators [302] have criticized what Professor Nagareda has aptly described as "the [*Boyd*] Court's conflation of the Fourth and Fifth Amendments." [303] Notwithstanding these criticisms of *Boyd*, however, the Court's *Hubbell* decision suggests that, in many cases, the Fifth Amendment in effect will protect the contents of private papers when the government subpoenas such documents from an individual—a result that is arguably closer to a *Boyd* analysis than a *Fisher* analysis.[304]

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301 *See* United States v. Leon, 468 U.S. 897, 905-06 (1984); United States v. Doe, 465 U.S. 605, 610 n.8 (1984); Andresen v. Maryland, 427 U.S. 463, 472 (1976); Fisher v. United States, 425 U.S. 391, 405-14 (1976).

302 *See* Amar & Lettow, *supra* note 28, at 916; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 790 (1994); Krauss, *supra* note 1, at 190-211; Robert L. Misner, *In Partial Praise of* Boyd*: The Grand Jury as Catalyst for Fourth Amendment Change*, 29 ARIZ. ST. L.J. 805, 811 n.37 (1997).

303 Nagareda, *supra* note 7, at 1585. Professor Nagareda criticizes *Fisher* and its progeny, *see id.* at 1590-1603, and argues that compelling a person "to give evidence" (including production of pre-existing documentary evidence) is to compel that person "to be a witness" in violation of the Fifth Amendment, *id.* at 1603-39. Professor Nagareda's position was embraced by two Justices in *Hubbell*, *see Hubbell*, 530 U.S. at 49 (concurring opinion of Justice Thomas, joined by Justice Scalia), but the majority continued to employ the analytical focus on preexisting government knowledge that *Fisher* introduced with the "foregone conclusion doctrine," which Professor Nagareda rejects as irrelevant to a principled fifth amendment analysis, *see* Nagareda, *supra* note 7, at 1596-99 (explaining what Professor Nagareda describes as "The Irrelevance of Preexisting Knowledge"). As the *Hubbell* Court described this aspect of its analysis, "here the Government has not shown that it had any prior knowledge of either the existence or the whereabouts of the 13,120 pages of *documents* ultimately produced by respondent [Hubbell]." *Hubbell*, 530 U.S. at 45 (emphasis added).

304 Another commentator has recognized that *Hubbell* may move Fifth Amendment law back toward *Boyd* and its "conflation" of the application of the Fourth and Fifth Amendments to document subpoenas. Professor Uviller believes that *Hubbell*'s "approach confuses Fourth and Fifth Amendment rights and hints at a rebirth of the thoroughly discredited and deeply interred *Boyd*

Professor Nagareda and others[305] have noted that *Boyd*'s treatment of the compelled production of documents by the owner of those documents as "the equivalent of a search and seizure"[306] is no longer valid.[307] Although that point is beyond dispute, the net result of the Court's decision in *Hubbell* is to limit the practical ability of prosecutors both to compel production of documents and to use the contents of those documents in prosecuting the witness who produced them. As a result, prosecutors conducting criminal investigations may be more likely to use search warrants, rather than subpoenas, to obtain documents from individuals. This Part compares the application of the Fourth and Fifth Amendments to document subpoenas and search warrants, focusing on the new insights provided by the Court's *Hubbell* decision.

A. Fourth Amendment Search Warrant Requirements.

Under what one commentator has characterized as "the conventional interpretation of the fourth amendment,"[308] searches must be conducted pursuant to a validly issued warrant except in those exceptional situations where it would not be feasible to require the authorities to obtain a warrant.[309] To obtain a warrant to search for documents, a

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doctrine." *See* Uviller, *supra* note 23, at 321. In an effort "to avoid the grim doctrinal consequence of applying the right against compelled self-incrimination to the inculpatory contents of subpoenaed documents," Professor Uviller asserts that *Fisher*'s protections should extend only to "express use of the fact of compliance alone"; in other words, the prosecution should free to make use of the contents of the documents produced so long as it makes no explicit reference to the physical act of production. *Id.* The problem with this approach is that while it might help resolve the tension between *Fisher* and *Hubbell*, it is virtually indistinguishable from the argument put forth by the Independent Counsel and squarely rejected by an eight-member majority of the Court in *Hubbell*. *See Hubbell*, 530 U.S. at 42-43.

305 *See supra* note 300.

306 Boyd v. United States, 116 U.S. 616, 634-35 (1886).

307 Professor Nagareda points out that "the Fourth and Fifth Amendments ultimately are not about end results; instead, they articulate two very different sorts of restraints upon two distinct means of information gathering by the government in the criminal process." Nagareda, *supra* note 7,. at 1587. Professor Nagareda goes on to argue that the Fifth Amendment should prevent the government from compelling an individual to produce self-incriminatory documents except where the government either (1) has sufficient information to obtain a search warrant for the documents, or (2) grants use immunity with respect to the documents themselves and any derivative fruits. *Id.* at 1640-41. This conception of the nature of the protection provided by the Fifth Amendment is consistent with this Article's interpretation of the implications of the Supreme Court's decision in *Hubbell*. *See supra* Part II.B.2.

308 Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 281-82 (1984); *see also* Stuart C. Berman, *Student Fourth Amendment Rights: Defining the Scope of the* T.L.O. *School-Search Exception*, 66 N.Y.U. L. REV. 1077, 1084 (1991); Nadine Strossen, Michigan Department of State Police v. Sitz*: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285, 351 (1991).

309 *See id.* at 282; *see also* Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531,

prosecutor must satisfy the probable cause and particularity requirements of the Fourth Amendment.[310] The Supreme Court has declined to articulate a precise definition of probable cause, noting instead that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[311] Although it has not provided a precise definition, the Court has described "probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."[312] This standard, however imprecise, is clearly a greater showing than that required to uphold the issuance of a grand jury subpoena duces tecum,[313] such as the one issued to Webster Hubbell by Independent Counsel Starr. The standard for upholding grand jury subpoenas is that the subpoena not be unreasonably burdensome to its target.[314] Accordingly, if prosecutors were required to show probable cause in order to obtain documents, some documents that now are routinely obtained by issuing a grand jury subpoena duces tecum would be unavailable to prosecutors investigating white-collar crime.[315]

536-37 (1997). A discussion of the various exceptions to the warrant requirement is not relevant to this Article, but for a description of those exceptions, see Kathryn A. Buckner, Note, *School Drug Tests: A Fourth Amendment Perspective*, 1987 U. ILL. L. REV. 275, 280-92 (1987).

310 U.S. CONST. amend. IV; *see also* JEROLD H. ISRAEL ET AL., WHITE COLLAR CRIME: LAW AND PRACTICE 633 (1996) ("To obtain a warrant authorizing a search for documents, a prosecutor must persuade a federal magistrate that there is probable cause to believe that a crime has been committed and that specific documents which would constitute evidence of the crime can be found in a particular place (typically a business office or residence).").

311 Illinois v. Gates, 462 U.S. 213, 232 (1983). Professor Wasserstrom has noted that, "In view of the centrality of the probable cause requirement to both the theory and practice of fourth amendment law, it is perhaps surprising that the Supreme Court has never tried to explain its precise meaning." Wasserstrom, supra note 308, at 305 (footnote omitted). The *Gates* Court did provide some further precision in a footnote: "As discussed previously, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Gates*, 462 U.S. at 243 n.13.

312 Ornelas v. United States, 517 U.S. 690, 696 (1996) (internal citation omitted).

313 As discussed in more detail below, *see infra* notes 322-31 and accompanying text, in *Hale v. Henkel*, 201 U.S. 43 (1906), the Supreme Court declined to impose a probable cause requirement for issuance of a grand jury subpoena. More recently, the Court has made clear that a grand jury subpoena should be upheld unless there is no reasonable possibility that it will lead to discovery of relevant evidence. *See* United States v. R. Enterprises, 498 U.S. 292, 301 (1991). As Professor Stuntz has observed: "Once *Hale* cast aside probable cause, nothing in Fourth Amendment law allowed courts to cabin the subpoena power, to treat it as an exceptional tool for use when ordinary tools will not work. The upshot was an almost limitless subpoena power." Stuntz, *supra* note 18, at 860-61.

314 *See id.* at 857-58 (citing BEALE ET AL., *supra* note 8, at 6-162 to 6-176. As Professor Stuntz aptly and succinctly notes: "Few burdens are deemed unreasonable." Stuntz, *supra* note 18, at 858. The use of grand jury subpoenas to obtain documents is discussed at *infra* Part III.B.

315 *See* Stuntz, *supra* note 18, at 859-60 (In white collar investigations, the government often must examine documents and question witnesses before it can establish probable cause. . . . The government may be able to generate enough evidence to raise some suspicion, but the evidence (and the suspicion) will often be weak until witnesses have been called and documents examined. Thus, a

The other Fourth Amendment requirement for issuance of a search warrant—the "particularity" requirement[316]—is more closely related to the Fifth Amendment concerns that occupied the Court in *Hubbell*. The particularity requirement encompasses both an adequate description of the particular place to be searched and the specific things to be seized.[317] Both of these requirements are implicated in a situation like that of the *Hubbell* case, in which prosecutors wish to obtain documents that may relate or refer to criminal activity, but are unsure about the documents' location and even their existence. Although courts are generally sympathetic to the special document needs of prosecutors investigating white collar crime,[318] a prosecutor in that situation would not be able to meet the particularity requirements of the Fourth Amendment.[319]

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probable cause standard for subpoenas would end many white-collar criminal investigations before they had begun."). Professor Stuntz goes on to argue that "courts could require a showing of probable cause, or something like it, as a condition of enforcing subpoenas." *Id.* at 864. He suggests that subpoenas should be subject to judicial review upon filing of a motion to quash so that a court can decide, before the subpoena is enforced, whether the seriousness of the particular crime under investigation is sufficient to outweigh the invasion of privacy occasioned by enforcement of the subpoena. *Id.* at 866-69.

316 *See* Marron v. United States, 275 U.S. 192, 196 (1927) ("The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.").

317 *See, e.g.*, Maryland v. Garrison, 480 U.S. 79, 84 (1987) (explaining that "[b]y limiting the authorization to search to the specific areas and things for which there is probable cause to search, the [particularity] requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit") (citation omitted); *see also* Larry EchoHawk & Paul EchoHawk, *Curing a Search Warrant that Fails to Particularly Describe the Place to be Searched*, 35 IDAHO L. REV. 1, 3 (1998); Rosemarie A. Lynskey, Note, *A Middle Ground Approach to the Exclusionary Remedy: Reconciling the Redaction Doctrine with* United States v. Leon, 41 VAND. L. REV. 811, 814 (1988).

318 *See, e.g.*, United States v. Wuagneux, 683 F.2d 1343, 1346 (11th Cir. 1982) (stating that "effective investigation of complex white-collar crimes may require the assembly of a 'paper puzzle' from a large number of seemingly innocuous pieces of individual evidence . . . [hence,] reading the warrant with practical flexibility entails an awareness of the difficulty of piecing together the 'paper puzzle'"), *cert. denied*, 464 U.S. 814 (1983); *see also* United States v. Regan, 706 F. Supp. 1102, 1113 (S.D.N.Y. 1989) ("The degree to which a warrant must state its terms with particularity varies inversely with [the] complexity of the criminal activity investigated.").

319 At oral argument in the *Hubbell* case, in response to a question from the Court as to whether the prosecution could have obtained a search warrant, John W. Nields, Jr., counsel to Mr. Hubbell, stated that the prosecution had acknowledged on the record that they could not have obtained a search warrant for the records they were seeking. *See* 2000 WL 230520 (U.S. Oral Arg.) at 34.

B. Use of Grand Jury Subpoenas to Obtain Documents.

The potential difficulties presented to the government by the particularity and probable cause requirements of the Fourth Amendment make it understandable that prosecutors ordinarily prefer to obtain documentary evidence through issuance of grand jury subpoenas[320] rather than by obtaining and executing search warrants.[321] Prior to the *Hubbell* decision, utilizing a grand jury subpoena duces tecum, augmented by a grant of act of production immunity if the subpoena recipient asserted his or her Fifth Amendment privilege, was clearly the best means for prosecutors to obtain documentary evidence. In the federal system, the prosecutors, not the courts, control the issuance of grand jury subpoenas, and even though the subpoenas are issued in the court's name and the authority of the court can be invoked to enforce them, the court ordinarily plays no role in their actual issuance.[322] In fact, federal prosecutors need not even obtain prior authorization from the grand jury to issue a subpoena.[323]

This broad discretionary power of federal prosecutors to issue grand jury subpoenas was (at least up until the *Hubbell* decision) largely unconstrained by constitutional limitations. As discussed above, only twenty years after deciding *Boyd*, the Court in *Hale v. Henkel*[324]

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320 It should be noted that compulsory production of testimonial and documentary evidence though issuance of investigatory subpoenas is not an indispensable element of criminal law enforcement. Unlike the federal system, many jurisdictions conduct police investigations without the benefit of subpoena power, and in many kinds of cases this lack of subpoena power does not impair criminal investigation and prosecution. Effective investigation of business and financial crimes (so-called "white-collar" crime), however, often requires use of compulsory process to obtain evidence. *See generally* BEALE ET AL., *supra* note 8, at 6-2 to 6-3. For this reason, the potential effect of the Supreme Court's *Hubbell* decision merits careful analysis.

321 In addition to the difficulties posed by the probable cause and particularity requirements, search warrants ordinarily involve greater administrative costs than a subpoena duces tecum. *See generally* ISRAEL ET AL., *supra* note 310, at 634-35. Moreover, the "exclusionary rule" remedy for conducting an unconstitutional search can be far more damaging to a prosecutor's case than the remedy for issuing an illegally overbroad subpoena, which is remedied by the court's granting a motion to quash the subpoena. *See id.* On the other hand, the potential damage to prosecutions posed by the exclusionary rule remedy for unconstitutional searches may well have been substantially mitigated by the Court's decision in *United States v. Leon*, 468 U.S. 897 (1984), which adopted a "reasonable good faith" exception to the exclusionary rule that permits introduction of evidence obtained through use of a defective search warrant if the warrant was issued by a "detached and neutral magistrate but ultimately found to be unsupported by probable cause." *Leon*, 468 U.S. at 900, 913, 921. Whatever the effect of *Leon* on prosecutorial behavior (and some believe it has been substantial, *see, e.g.*, Steven Duke, *Dialog: Making* Leon *Worse*, 95 YALE L.J. 1405, 1412 (1986)), the point remains that federal prosecutors ordinarily prefer to obtain documentary evidence by issuing grand jury subpoenas rather than by obtaining and executing search warrants.

322 *See* BEALE ET AL., *supra* note 8, § 6:2 at 6-10.

323 *Id.* at 6-11.

324 201 U.S. 43 (1906). *Hale* also is significant for its holding that corporations cannot assert a Fifth Amendment privilege. *See Hale*, 201 U.S. at 76-77 (stating that due to their special "privileges and franchises" a corporation is not entitled to a Fifth Amendment privilege, but is

effectively abandoned the concept of Fourth or Fifth Amendment limitations on the scope of subpoenas.[325] Although the *Hale* court did recognize that the Fourth Amendment imposes some limit on the subpoena power,[326] and even concluded that the particular subpoena before the Court was unreasonable because it was "far too sweeping in its terms,[327] the Court largely dismissed the *Boyd* presumption that a subpoena amounted to an unreasonable search and seizure. The *Hale* Court, expressing concern about the administration of justice,[328] departed from *Boyd*[329] by finding it "quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of the courts to compel, through a subpoena duces tecum, the production, upon a trial in court, of documentary evidence."[330] This holding reflected more law enforcement pragmatism[331] than constitutional principle[332] and

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nonetheless protected by the general "reasonableness" requirement of the Fourth Amendment). *Hale* and the "collective entity" cases that have expanded this holding thus limit the impact of the Court's decision in *Hubbell* to cases involving individuals. Corporations, partnerships, and other collective business entities, which cannot assert a Fifth Amendment privilege even for the act of production of documents, therefore, will not be affected by the *Hubbell* decision. Moreover, as Hubbell's counsel pointed out in oral argument before the Court, even in cases involving sole proprietorships, the government usually can compel some other individual, such as a bookkeeper, secretary, or other document custodian, to produce the subpoenaed documents. *See* 2000 WL 230520 (U.S. Oral Arg.) at 30-31. This means that the impact of *Hubbell* is limited to those situations in which the subject of an investigation is immunized and compelled to produce his or her private papers. *Cf. id.* at 31.

325 *See* BEALE ET AL., *supra* note 8, § 6:20 at 6-163; *see also* Stuntz, *supra* note 18, at 861 (describing the federal subpoena power after *Hale* as "almost limitless"), 864 (describing the federal subpoena power as "something akin to a blank check).

326 *See Hale*, 201 U.S. at 76.

327 *Id. See generally* 2 JOHN WESLEY HALL, JR., SEARCH AND SEIZURE § 39:4 at 526-27 (2d ed. 1982) (discussing the impact of *Hale* on fourth amendment law).

328 *See Hale*, 201 U.S. at 73.

329 *See* BEALE ET AL., *supra* note 8, § 6:20 at 6-163 ("The Court's decision [in *Hale*], while purporting simply to interpret the *Boyd* case, was in fact a square rejection of the Fourth Amendment analysis in *Boyd*, based on pragmatic considerations.").

330 *Hale*, 201 U.S. at 73. The Court's hesitance to use the Fourth Amendment to hinder law enforcement's use of subpoenas to gather evidence may also have motivated the Court's later holding in *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946). In that case, the Court held that a subpoena duces tecum issued by an administrative agency should be upheld so long as (i) it was issued "for a lawfully authorized purpose," (ii) "the documents sought are relevant to the inquiry," and (iii) the "specification of the documents to be produced [is]adequate . . . for purposes of the relevant inquiry." *See Oklahoma Press*, 327 U.S. at 208-09. Although *Oklahoma Press* involved an administrative subpoena, rather than a grand jury subpoena, its liberal standard for upholding subpoenas is still cited with approval today. *See* HALL, *supra* note 327, § 39:4 at 528; *see also* BEALE ET AL., *supra* note 8, § 6:20 at 6-164 (referring to *Oklahoma Press* as a "leading case").

331 *See* BEALE ET AL., *supra* note 8, § 6:20 at 6-163 ("The Court's decision [in *Hale*], while purporting simply to interpret the *Boyd* case, was in fact a square rejection of the Fourth Amendment analysis in *Boyd*, based on pragmatic considerations.").

332 *Cf.* Stuntz, *supra* note 18, at 859 (analyzing the Court's holding in *Hale* and describing the "lax standard" employed by the Court as arising out of "substantive necessity"); *see also* Note, *All Quiet on the Paper Front: Asserting a Fifth Amendment Privilege to Avoid Production of Corporate Documents in* In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999, 46 VILL. L. REV. 547, 554-57, 577 (2001) (describing the Court's approach in *Hale* and subsequent cases as supported by the "white-collar rationale" defined by Peter J. Henning as "the notion that the rules of

left the application of the Fourth Amendment to subpoenas somewhat unsettled.[333]

That uncertainty remained through most of the twentieth century. In 1991, the Supreme Court provided some further guidance on prosecutors' power to issue document subpoenas in *United States v. R. Enterprises, Inc.*[334] In that case, a grand jury had subpoenaed business records and videotapes from an adult entertainment company in connection with an obscenity investigation.[335] The subpoenas were challenged on a motion to quash, and on appeal, the Fourth Circuit held that the government should be required to make a preliminary showing that the subpoenaed materials would be admissible at trial and that the targets of the investigation were subject to prosecution in the judicial district where the subpoenas were issued.[336] In reviewing the Fourth Circuit's holding, the Supreme Court stressed the "unique role" of the grand jury in our criminal justice system and the difference between investigative grand jury subpoenas and trial subpoenas.[337] For these reasons, the Court rejected imposition of relevance or admissibility requirements[338] on grand jury subpoenas.[339] The Court concluded that when a grand jury subpoena duces tecum is challenged on relevancy grounds, the motion to quash must be denied "unless the district court determines that there is no reasonable possibility that the materials sought will produce information relevant to the grand jury's investigation."[340]

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non-white-collar crime cases involving the Fifth Amendment should not apply to complex economic crimes"); Henning, *supra* note 19, at 416-18.

333 *See* 2 JOHN WESLEY HALL, JR., SEARCH AND SEIZURE § 39:4 at 527 & n.48 (2d ed. 1982) (citing Judge Friendly's observation in *In re Horowitz*, 482 F.2d 72, 76 (2d Cir. 1973), *cert. denied*, 414 U.S. 867 (1973), that *Hale* "left the applicability of the Fourth Amendment to subpoenas duces tecum in a most confusing state").

334 498 U.S. 292 (1991).

335 *Id.* at 294-95.

336 *See* In re Grand Jury 87-3 Subpoena Duces Tecum (Under Seal), 884 F.2d 772 (4th Cir. 1989), *rev'd sub nom* In re R. Enterprises, Inc., 498 U.S. 292 (1991). Commentators have noted that such a requirement is very unusual for a grand jury subpoena, and that the Fourth Circuit may have been motivated by concerns that the subpoenas could impinge upon First Amendment rights. *See also* BEALE ET AL., *supra* note 8, § 6:21 at 6-173 to 6-176 (providing a detailed explanation of the history of the *R. Enterprises* case).

337 *R. Enterprises*, 498 U.S. at 297.

338 The Court was applying Federal Rule of Criminal Procedure 17(c), which governs the issuance of subpoenas duces tecum in all federal criminal proceedings, including grand jury subpoenas, and provides that "the court on motion may promptly quash or modify the subpoena if compliance would be unreasonable or oppressive." *R. Enterprises*, 498 U.S. at 299-300.

339 *Id.* at 298-99.

340 *Id.* at 301. This "no reasonable possibility" standard is made even broader by the Court's admonition that the subpoenaed materials need only "produce" information relevant to the grand jury's investigation, as opposed to a requirement that the materials themselves be relevant. *See id.* This derivative relevance standard is more like the civil litigation discovery standard, *see* 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 26(b)(1) (1994), or the "reasonably calculated to lead to the discovery of admissible evidence" civil litigation standard, than the criminal jury trial standard announced by the Court in *United States v. Nixon*, 418 U.S. 683

With this backdrop in place, it is not surprising that at the time of the *Hubbell* decision federal prosecutors viewed their power to issue grand jury subpoenas as virtually unlimited.[341] Under the case law developed by the Supreme Court since *Boyd*, neither the Fourth Amendment nor the Fifth Amendment imposed any meaningful restraints on the power of federal prosecutors to issue grand jury subpoenas.[342] If the recipient of a subpoena does not interpose Fourth Amendment objections in the form of a motion to quash, which *R. Enterprises* makes unlikely, or assert a Fifth Amendment privilege claim, which *Fisher* and its progeny make unlikely, the prosecution [343] can subpoena any information it wishes to obtain without regard to issues such as cost of compliance or invasion of personal privacy.[344]

C. Grants of Act of Production Immunity in Document Subpoena Cases.

Prior to the *Hubbell* decision, another factor contributed to the enormous power of federal prosecutors to use grand jury subpoenas to obtain information about subjects of criminal investigations. Even an

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(1974) (imposing relevancy, admissibility, and specificity requirements on a criminal trial subpoena). *See also R. Enterprises*, 498 U.S. at 299.

341 At oral argument in *Hubbell*, the Independent Counsel's office characterized the *R. Enterprises* standard as "not difficult for grand juries to satisfy," *see* 2000 WL 230520 (U.S. Oral Arg.) at 6, and said that under *R. Enterprises*, "having a hunch is more or less what the standard [for an enforceable grand jury subpoena] is," *id.* at 14. *Cf.* Stuntz, *supra* note 18, at 860-61 ("Once *Hale* cast aside probable cause, nothing in Fourth Amendment law allowed courts to cabin the subpoena power, to treat it as an exceptional tool for use when ordinary tools will not work. The upshot was an almost limitless subpoena power.").

342 Professor Uviller has clearly and succinctly described the pre-*Hubbell* conception of the broad powers of prosecutors to use subpoenas duces tecum to "fish for evidence of crime." Uviller, *supra* note 23, at 323 ("Indeed, prosecutors—and the grand juries they lead—are supposed to go fishing. They are supposed to enlighten themselves by the product of their subpoenas. There is no requirement that they know what they will get before they ask for it."). As discussed below, the holding in *Hubbell* obviously raises significant questions as to the continued vitality of this broad conception of prosecutors' power to use subpoenas duces tecum to engage in "fishing expeditions." Uviller, *supra* note 23, at 323 (explaining that federal prosecutors managing a grand jury investigation need not obtain approval from the grand jury or the court before issuing a subpoena in the name of the court).

343 In this regard it is worth noting that much of what is subpoenaed in the typical grand jury investigation is never actually presented to the grand jury. There is no requirement that prosecutors show all subpoenaed materials to the grand jury, *see* F. WHARTON, CRIMINAL PLEADING AND PRACTICE § 360, at 248-49 (8th ed. 1880); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 1 FED. PRAC. & PROC. CRIM.3d § 111.1 (R 6) (1999), and since *United States v. Williams*, 504 U.S. 36 (1992), prosecutors ordinarily are not even required to present to the grand jury exculpatory evidence in their possession. *See id.* at 45-47.

344 The extraordinary scope of this power and the lack of meaningful limitations lend credence to Professor Stuntz's argument for judicial review of grand jury subpoenas under a "substantive fourth amendment." *Cf.* Stuntz, *supra* note 18, at 842.

assertion of the Fifth Amendment privilege against self-incrimination for the act of producing documents could easily be overcome by granting act of production immunity and compelling production of the requested materials.[345] Such a grant of immunity, even to the target of an investigation as in the *Hubbell* case, was not regarded by prosecutors as a serious impediment to subsequent prosecution of the individual who produced the documents.[346] To fully explore the government's position and to fully appreciate the significance of the *Hubbell* Court's rejection of that position, it is helpful to review the law governing grants of "use and derivative use immunity" to witnesses.

In *Hubbell*, an immunity order was entered pursuant to the federal immunity statute,[347] giving Webster Hubbell "use and derivative use" immunity for the act of producing the subpoenaed documents.[348] The use and derivative use immunity given to Hubbell differs from full

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345 *See* Henning, *supra* note 19, at 443; Eric Steven O'Malley, *Thirtieth Annual Review of Criminal Procedure: Introduction and Guide for Users: III. Trial: Fifth Amendment at Trial,* 89 GEO. L.J. 1598, 1610 (2001).

346 At oral argument in *Hubbell*, the attorneys representing both the Office of Independent Counsel, which had brought the prosecution, and the Department of Justice, which submitted an amicus brief in support of the Independent Counsel, argued that the grant of immunity to Hubbell for the act of producing the documents, which they admitted were used to prepare the indictment against him, should not preclude his subsequent prosecution. The attorney representing the Independent Counsel asserted that the grant of immunity should only "prevent us from introducing into evidence or using in our investigation the fact that Mr. Hubbell possessed these documents." 2000 WL 230520 (U.S. Oral Arg.) at 15. Counsel for the Department of Justice conceded that after granting immunity the government also could not make use of "the mental act that the witness uses to correlate documents with a subpoena." *Id.* at 19; *see also id.* at 4 ("[I]n this particular case and I think in most cases where you have a production of documents, you have to distinguish between the things that the witness is forced to say, implicitly or explicitly—and in this case, I think those things were much the same—and the contents of the documents. And in this case—and I think in many cases—we don't have to use and we didn't use in any way any of the things that he said. I mean, all we're using is the information that was in the documents. I think the—the key for us to this case is that it's not relevant that we got the documents."); *id.* at 18 ("[T]he Government has to show that it does not use anything testimonial in the investigation that leads up to the prosecution."); *id.* at 22 ("If we show that we made no use whatsoever of any of the act of production, but only the contents of the records, that's fine."). The Independent Counsel and the Department of Justice took similar positions in the briefs they submitted to the Court. *See* 1999 WL 1072535 at 11-12 (OIC brief) ("The compelled testimonial communication implicit in an act of production does not taint the otherwise unprivileged, voluntarily created, pre-existing contents of the documents produced. This is the case whenever the government makes investigative use of the contents of documents compelled under 18 U.S.C. § 6002 but does not need to rely on a defendant's testimonial communication to prove his possession of the documents, the existence of the documents or their authenticity."); 1999 WL 230520 at 13 (DOJ amicus brief) ("The government's possession of subpoenaed documents, and its consequent ability to make investigative and evidentiary use of their contents, is the result of the purely physical aspects of respondent's act of production, not the fruit of any compelled testimony."). Ultimately, as discussed in more detail below, the Court rejected these arguments and concluded that a grant of immunity for the act of producing documents has much greater ramifications for subsequent prosecution of the individual who is granted immunity.

347 18 U.S.C. §§ 6002, 6003 (2000).

348 *See* United States v. Hubbell, 167 F.3d 552, 563 (1999), *aff'd.*, 530 U.S. 27 (2000). *See generally* Kastigar v. United States, 406 U.S. 441 (1972) (upholding the constitutionality of use and derivative use immunity grants to compel testimony).

"transactional" immunity, which would have prevented the government from prosecuting Hubbell for any crimes related to the information obtained through the immunity grant.[349] For much of our history, the assumption was that a valid assertion of the Fifth Amendment privilege against self-incrimination could be overcome only by a grant of full transactional immunity, which would prohibit subsequent prosecution of the witness asserting the privilege. In 1892, the Supreme Court reviewed a challenge to an 1868 immunity statute that provided an immunized witness protection only from the "use" of immunized testimony.[350] In *Counselman v. Hitchcock*,[351] the Court rejected this "use" immunity as failing to provide protection adequate to override a defendant's Fifth Amendment privilege against self-incrimination.[352] Broad language in *Counselman*[353] suggested that transactional immunity was the only means by which the government could constitutionally overcome a witness's assertion of the Fifth Amendment privilege.[354] In any event, as the *Hubbell* Court subsequently observed, a grant of use immunity "was plainly deficient in its failure to prohibit the use against the immunized witness of evidence derived from his compelled testimony."[355]

In 1893, Congress passed a "transactional" immunity statute in response to the *Counselman* decision. By providing that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise,"[356] the new statute gave an immunized witness full transactional immunity from prosecution. This statute remained in place until 1970,[357] when Congress enacted 18 U.S.C.

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349 *See generally* BEALE ET AL., supra note 8, at § 7-3 (explaining the difference between transactional immunity and use and derivative use immunity). The Independent Counsel could have given Hubbell full transactional immunity had he wished, and in fact later did so in a celebrated instance involving another witness, Monica Lewinsky. *See generally* JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 823-24 (2001) (reprinting immunity agreement between Independent Counsel Kenneth W. Starr and Monica S. Lewinsky).

350 *See* Act of Feb. 25, 1868.

351 142 U.S. 547 (1892).

352 *See id.* at 585-86.

353 "In view of the [Fifth Amendment] constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates." *Id.* at 585-86.

354 Professor Uviller has called *Counselman* a "decision that was universally misread for eighty years to require 'transactional' immunity (true immunity against future prosecution) until the nation was set straight by *Kastigar v. United States*, 406 U.S. 441 (1972)." Uviller, *supra* note 23, at 319 n.33.

355 United States v. Hubbell, 530 U.S. 27, 39 n.21 (2000).

356 *See* Act of Feb. 11, 1893; *see also* R. S. Ghio, *The Iran-Contra Prosecutions and the Failure of Use Immunity*, 45 STAN. L. REV. 229, 237 (1992).

357 During this period, Congress enacted more that fifty federal immunity statutes, all of which provided full transactional immunity. *See* BEALE ET AL., supra note 8, at § 7:5 & n.10 (citing NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, WORKING PAPERS 1444-45 (1970)).

§§ 6002 and 6003, which provide only use and derivative use immunity and therefore "do[] not 'afford [the] absolute immunity against future prosecution' referred to in *Counselman*."[358]

In 1972, the Supreme Court decided *Kastigar v. United States*[359] and approved the use and derivative use immunity provided by the new federal statute as "coextensive with the privilege against self-incrimination."[360] The Court's reasoning turned on its conception of the extent of the protection afforded by the Fifth Amendment:

> While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which affords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. . . . Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.[361]

By permitting subsequent prosecution of an immunized witness, *Kastigar* appeared to have altered the balance of power between witnesses who asserted their privilege against self-incrimination with respect to their testimony and prosecutors who were seeking that testimony but did not wish to forego all opportunity to prosecute the witness who possessed the information.[362]

The extent of the change brought about by *Kastigar*'s approval of the use and derivative use immunity statute ultimately was tempered by the difficulty of proving that the prosecution had made no improper use of the immunized testimony. In *United States v. North*,[363] the United States Court of Appeals for the District of Columbia Circuit analyzed the heavy burden that the prosecution bears under *Kastigar* if it seeks to prosecute a previously immunized witness. The court defined impermissible use of

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358 *See Kastigar*, 406 U.S. at 452. *See generally* Ghio, *supra* note 356, at 238; John Van Loben Sels, *From Watergate to Whitewater: Congressional Use Immunity and Its Impact on the Independent Counsel*, 83 GEO. L.J. 2385, 2388-89 (1995); Leonard N. Sosnov, *Separation of Powers Shell Game: The Federal Witness Immunity Act*, 73 TEMP. L. REV. 171, 184-86 (2000).

359 406 U.S. 441 (1972).

360 *Id.* at 453. Some commentators have criticized this conclusion, and continue to advocate for a return to transactional immunity. Ghio, *supra* note 356, at 251-52.

361 *Kastigar*, 406 U.S. at 453 (emphasis in original).

362 *See generally* Amar & Lettow, *supra* note 28, at 877-79.

363 910 F.2d 843 (D.C. Cir. 1990).

immunized testimony broadly, concluding that "the use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements, constitutes evidentiary use," and therefore, requires a *Kastigar* hearing.[364] This broad definition of what constitutes an unconstitutional "use" of immunized testimony presents a significant obstacle to prosecution of a previously immunized witness.[365] The D.C. Circuit left little doubt that the test will be a difficult one for the prosecution to meet:

> That inquiry must proceed witness-by-witness; if necessary, it will proceed line-by-line and item-by-item. For each grand jury and trial witness, the prosecution must show by a preponderance of the evidence that no use whatsoever was made of any of the immunized testimony either by the witness or by the [prosecution] in questioning the witness.[366]

Finally, the *North* court made clear that a failure to meet this test would require either a new trial or, in the case of grand jury evidence, dismissal of the indictment.[367]

North was not a typical criminal case, and commentators differ as to its overall impact. While some commentators believe that *North* effectively restored transactional immunity,[368] others view it as a special case involving an unusually high-profile investigation that created special problems for post-use immunity grant prosecution.[369] Even though not all federal courts have adopted the "super-strict" approach of *North*,[370] there is no doubt that the case provides a powerful example of the difficulty the government faces under *Kastigar* when it seeks to prosecute an immunized witness.[371]

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364 *Id.* at 856.

365 *See* Ghio, *supra* note 356, at 255 (praising the court in *North* for interpreting *Kastigar* in a fashion that effectively restores transactional immunity). *But see* Jerome A. Murphy, *The Aftermath of the Iran-Contra Trials: The Uncertain Status of Derivative Use Immunity*, 51 MD. L. REV. 1011, 1050-53 (1992) (criticizing the court in *North* for unnecessarily expanding the scope of *Kastigar*, and for effectively re-instating transactional immunity at least in high-publicity cases).

366 *North*, 910 F.2d at 872.

367 *Id. at* 872-73.

368 *See* Ghio, *supra* note 356, at 237.

369 *See* Murphy, *supra* note 363, 1052-53 (suggesting that *North* could be limited to high-publicity cases).

370 *See* Amar & Lettow, *supra* note 28, at 879 (describing the D.C. Circuit's *North* approach as "super-strict" and noting that other circuits "have diverged from a super-strict approach, and with good reason").

371 *See generally* Ronald F. Wright, *Congressional Use of Immunity Grants After Iran-Contra*, 80 MINN. L. REV. 407, 409 (1995).

D. *Hubbell* Raises the Stakes for Act of Production Immunity Grants.

The *Hubbell* case provides important new guidance on an area of criminal law that can be described as the intersection of *Fisher* and *North*. Even after *North*, few prosecutors (and perhaps few judges) regarded the act of production privilege recognized in *Fisher* as presenting the same potential for complex *Kastigar* hearings as immunized testimony.[372] We now know that the Supreme Court views the matter differently. *Hubbell* demonstrates that the *Kastigar* test must be applied with the same vigor whether the immunized testimony is in the form of the act of producing documents or the act of providing oral testimony. Just as *North* and cases like it have made prosecutors extremely wary of giving even use and derivative use immunity to potential subjects or targets of criminal investigations, *Hubbell* is likely to make prosecutors hesitate before immunizing an act of production of documents by a potential subject or target. The obvious question that follows from that result is what will prosecutors do? How will they seek to obtain documents from such individuals? Part V of this Article addresses these questions.

V. Prosecutorial Efforts to Obtain Private Papers from Individuals After *Hubbell*.

Read together, the D.C. Circuit's *Hubbell* opinion analyzing the act of production doctrine and the Supreme Court's opinion affirming the D.C. Circuit promise to have a major impact on Fifth Amendment law. To understand the full impact of the *Hubbell* case, it is helpful to examine both the explicit practical questions that the Supreme Court's opinion answers and the implicit theoretical questions that the opinion raises.

A. The Broad Reach of the Supreme Court's Holding in *Hubbell*.

The clearest points from *Hubbell* are the arguments that were rejected by both the D.C. Circuit and the Supreme Court. Both courts firmly and decisively rejected the government's argument that the act of production doctrine should apply only to the physical act of production, and therefore, the doctrine could be satisfied by treating the subpoenaed documents as "manna from heaven" that appeared as if by magic on the

372 The immunized testimony at issue in *North* was provided to congressional committees, not to a grand jury or at a criminal trial, *see North*, 910 F.2d 843, but that distinction is not important because the same immunity statute and constitutional provisions were at issue.

grand jury table.[373] The government pressed this argument[374] because it minimizes the protection afforded by the act of production privilege. The government had argued that the act of production doctrine protected only the physical act of compelled production, and the production of documents was analogous to forcing a witness to surrender the key to a strongbox.[375] The conclusion of this argument was that the government can use evidence contained in the strongbox against the witness who surrendered the key, and by analogy, the government should be able to use the contents of the documents against the witness who produced them. The Supreme Court dismissed this "anemic view" of the act of production as "a mere physical act" as failing to account for the realities of the communicative aspects of producing documents in response to a subpoena.[376] The Court concluded that the mental efforts required by a witness to assemble and produce subpoenaed documents was like testifying to the combination to a wall safe, not like physically surrendering the key to a strongbox.[377]

This is the first and most basic question that the *Hubbell* case answers: What is the nature of the act of production? The Court said in the clearest possible terms that the act of producing documents in response to a subpoena is not merely a physical act; it also may be a testimonial communication that imparts information. For that reason, the government cannot overcome an assertion of the act of production privilege merely by making no reference to the physical act of production. This part of the *Hubbell* opinion should permanently put to

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373 *See* United States v. Hubbell, 530 U.S. 27, 42 (2000); United States v. Hubbell, 167 F.3d 552, 583 (1999), *aff'd.*, 530 U.S. 27 (2000).

374 *See* 1999 WL 1076136 at 25 (DOJ amicus brief) ("Under Judge Alito's approach, the grant of use immunity should place the government in the same position that it would occupy if the documents had 'materializ[ed] in the grand jury room as if by magic before a subpoena has been issued'—*i.e.*, the position it would occupy if the government 'ha[d] the records but [had] no idea where they came from and no information about the meaning of the records except what could be learned from the records themselves.' Judge Alito explained that '[t]his image is helpful because it allows us to separate the contents of the records from any evidence, direct or circumstantial, concerning their production.' That analysis is correct.") (citing Alito, *supra* note 8, at 60).

375 *See* 2000 WL 230520 at 9 (U.S. Oral Argument of Ronald J. Mann) ("And so, if we make him tell us the combination to the safe, if we make him tell us the information we want, well, then we lose. But if what we do is we force him to the physical act of handing it to us, that's permissible.").

376 *See Hubbell*, 530 U.S. at 43. In contrast, this "anemic" view of the Fifth Amendment seems to have been endorsed by both Judge Williams, who dissented from the Fifth Amendment portion of the D.C. Circuit's *Hubbell* opinion, *see Hubbell*, 167 F.3d at 552, 597 (dissenting from Part II of the opinion), and Chief Justice Rehnquist, who dissented from the Supreme Court's *Hubbell* opinion, *see Hubbell*, 530 U.S. at 49 (dissenting "for the reasons given by Judge Williams in his dissenting opinion"). One commentator has taken the side of the dissenters and argued that *Hubbell* was wrongly decided by the Court. *See* Uviller, *supra* note 23, at 311.

377 *See Hubbell*, 530 U.S. at 43.

rest the "manna from heaven" conception of the act of production privilege.[378]

The *Hubbell* case also lays to rest a second government argument that would have minimized the protection provided by the act of production privilege. Even if the act of production is inherently testimonial and communicative, as the *Hubbell* Court confirmed, under *Fisher* it can be overcome if the information that is communicated through the act of production is a "foregone conclusion."[379] The government argued that any time business and financial records are subpoenaed, the foregone conclusion doctrine should apply because it is reasonable to assume that anyone engaged in business keeps some such records.[380] If accepted, this argument would mean that a witness could not assert an act of production privilege with respect to business and financial documents, or else a court would be required to reject the witness's assertion of privilege if the government moved to compel production. The end result would be that the production of the very kind of documents which are subpoenaed in most white-collar crime investigations (business and financial records) would never be subject to Fifth Amendment protection. Although production of other kinds of documents, such as diaries and personal writings, might still be protected by the privilege, the "ordinary business records" exception would essentially swallow the act of production privilege rule announced in *Fisher*.

This is the second question that the *Hubbell* case answers: Are business and financial records presumptively subject to the foregone conclusion doctrine? The Court answered this question by rejecting the "overbroad argument that a businessman such as [Hubbell] will always possess general business and tax records."[381] This part of the *Hubbell*

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378 Professor Uviller has described the "manna from heaven" analysis that was rejected in *Hubbell* as "precisely how I have taught the law of implicit self-incrimination by compliance with a subpoena *duces tecum*." Uviller, *supra* note 23, at 311. He goes on to say that his "clear understanding of the *Fisher* doctrine is exactly what was rejected by the Supreme Court," *id.* at 312, and concludes that the Court's decision in *Hubbell* was wrongly decided, *see id.* at 335. Such a strong condemnation of the outcome might be unremarkable in response to a closely divided in a 5-4 Supreme Court decision, but in a nearly unanimous 7-1 decision, it serves to highlight the significance of what the Court decided in *Hubbell* and how dramatically the Court has departed from the conventional understanding of the *Fisher* act of production doctrine.

379 *See* Fisher v. United States, 425 U.S. 391, 411 (1976).

380 *See* 1999 WL 1072535 at 10-11 (OIC brief) ("This case, like *Fisher*, involves a subpoena that seeks production of typical and customary business records (including tax and bank account records), which the government naturally would expect a businessman, like respondent, to maintain. Under *Fisher*, respondent's production of such ordinary business records is not sufficiently testimonial to implicate the Fifth Amendment."); 1999 WL 1076136 at 11 (DOJ amicus brief) ("An implicit admission of possession of ordinary financial documents does not rise to the level of a testimonial communication under the Fifth Amendment.").

381 *See Hubbell*, 530 U.S. at 45.

opinion should permanently put to rest the "ordinary business records" foregone conclusion argument.

B. The Fifth Amendment Analytical Framework Mandated by *Hubbell*.

The explicit rejection of these two arguments leaves unanswered the fundamental question of when the foregone conclusion doctrine applies. The D.C. Circuit answered this question by articulating the reasonable particularity test,[382] but the Supreme Court declined to adopt that test.[383] The Court went only so far as to say that the government must show prior knowledge of the existence and location of the subpoenaed documents.[384] Although this guidance from the Court may not answer the question of whether the foregone conclusion doctrine should apply in a particular situation—how much prior knowledge is enough?—it is sufficient to establish the analytical framework for post-*Hubbell* Fifth Amendment document production cases. That framework consists of three distinct inquiries, defined by the D.C. Circuit and Supreme Court opinions in the *Hubbell* case.

1. Phase One – Assessing the Testimonial Value of the Act of Production.

Phase one of the act of production analysis is the *Fisher/Doe I* inquiry into whether the act of production has sufficient testimonial value to be protected by the Fifth Amendment or, stated differently, whether the testimonial information that would be conveyed is a "foregone conclusion" because the government has "prior knowledge" of that information.[385] Several points concerning this judicial inquiry are clear after *Hubbell*. First, the burden is on the government to show prior knowledge. Second, the argument that existence and possession of "ordinary business records" can be presumed, thus relieving the government of its burden to show prior knowledge, can no longer be asserted. Third, if the government requires assistance from the witness in identifying and assembling the documents that are subject to the subpoena, then it cannot meet its prior knowledge burden. The only significant question left unanswered by the Supreme Court in *Hubbell* is how the courts should decide a close case in which the government has

382 *See supra* Part II.A.3.

383 *See Hubbell*, 530 U.S. at 45.

384 *Id.*

385 *See id.* ("[T]he government has not shown that it had any prior knowledge of either the existence or the whereabouts [of the subpoenaed documents.]").

some prior knowledge but the witness asserts an act of production privilege and declines to produce the subpoenaed documents. Future development of the case law should answer this question, as the lower courts decide whether to adopt the D.C. Circuit's "reasonable particularity" test—and nothing in the Supreme Court's *Hubbell* opinion suggests they should not do so—or develop alternative tests.

If the government can satisfy the prior knowledge requirement, then a court should grant a motion to compel and require production of the subpoenaed documents. The government is most likely to be able to meet this requirement when it is subpoenaing a limited number of specifically described documents, as opposed to broad categories of documents, and it has evidence that those documents exist and are in the possession or control of the witness. The broader and more general the subpoena, the less likely it will be that the government can satisfy the prior knowledge requirement. This aspect of *Hubbell* alone has enormous ramifications for white collar criminal enforcement. Careful prosecutors are likely to stop relying on the kind of broad, all-encompassing, boilerplate document subpoenas that have become a staple of white-collar practice, at least in cases where an individual rather than a collective entity is being subpoenaed. Moreover, as discussed below, prosecutors may be more likely to obtain a search warrant and seize the documents, rather than issue a subpoena, perhaps hoping that a search will lead to other evidence that would not have been produced in response to a subpoena.

If these changes occur, then the *Hubbell* case will have significantly influenced criminal law investigation and enforcement. The use of broad "fishing expedition" document subpoenas will be curtailed, and investigations will be more focused. Significant resources, on both the prosecution and defense sides, that now are devoted to document review, collection, organization, and production, will be freed up. The costs of conducting and defending investigations will be reduced. Prosecutors should be able to investigate more cases, and defense costs should be reduced for targets and subjects of grand jury investigations. Both of these developments potentially could reduce the number of plea bargain agreements, at least in marginal cases. The government may have more resources available to try cases, and defendants may be better able to bear the costs of trial if their resources have been less drained by responding to broad document subpoenas and addressing the issues presented by documents produced in response to those subpoenas. It is difficult to predict the degree to which any of these possible outcomes ultimately will occur, but they have the potential to bring real change to the conduct of white collar criminal investigations.

2. Phase Two – Determining Whether the Act of Production is Incriminating.

The possible changes discussed above all flow from first phase of the post-*Hubbell* act of production analysis: the reinvigorated *Fisher/Doe I* foregone conclusion inquiry. The second phase of the Fifth Amendment act of production judicial review process arises when the government cannot meet the prior knowledge requirement. Both the D.C. Circuit[386] and Supreme Court[387] opinions in the *Hubbell* case make clear that even if existence and possession is not a foregone conclusion, a court still must inquire into whether the testimonial component of the act of producing documents in fact is incriminating. If the information that is communicated by the act of production (*e.g.*, the existence, location, and authenticity of the documents produced) "would furnish a link in the chain of evidence needed to prosecute the [witness,]" then the privilege should be upheld.[388] Although neither court analyzed this issue in great detail,[389] both opinions clearly contemplate a judicial assessment of the incrimination issue.

This "phase two" judicial inquiry into whether the testimonial component of the act of production is incriminating should not be confused with the separate inquiry into whether the act of production has sufficient testimonial value to be protected by the Fifth Amendment. The latter seeks to determine whether the act of production communicates sufficient information to be testimonial. If the answer to that question is affirmative, the court still must determine whether the testimonial information that would be provided by the act of production is in fact incriminating (whether directly or indirectly). In most cases, as the *Hubbell* opinions suggest, the testimony inherent in the act of production

386 *See* United States v. Hubbell, 167 F.3d 552, 581-82 (1999), *aff'd.*, 530 U.S. 27 (2000) (analyzing authorities on when testimonial communications are sufficiently incriminatory to implicate the Fifth Amendment privilege against self-incrimination).

387 *See Hubbell*, 530 U.S. at 38 (discussing the *Hoffman v. United States*, 341 U.S. 479 (1951), test for determining when compelled testimony is incriminating and citing *Doe v. United States*, 487 U.S. 201, 208 n.6 (1988) [hereinafter *Doe II*], for the proposition that "[c]ompelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory").

388 *See Hubbell*, 530 U.S. at 38 (quoting *Hoffman*, 341 U.S. at 486).

389 While the D.C. Circuit observed that "it appears that Hubbell's testimony likely involved both direct and indirect incrimination," *Hubbell*, 167 F.3d at 582, it left the incrimination inquiry for the district court to resolve on remand, *see id.* ("[I]t would be premature for us to review the incrimination question any further at this juncture."). The Supreme Court reviewed relevant authorities on the question of when testimony is incriminatory, *see Hubbell*, 530 U.S. at 38, but did not apply those authorities directly to the facts of *Hubbell* and seems to have viewed the incrimination element as self-evident, *see id.* at 45 ("Given our conclusion that respondent's act of production had a testimonial aspect, at least with respect to the existence and location of the documents sought by the Government's subpoena, respondent could not be compelled to produce those document without first receiving a grant of immunity . . . .").

will be incriminating, but this inquiry does provide a judicially controlled "safety valve" for dismissing frivolous or unwarranted claims of privilege.[390]

3. Phase Three – The *Kastigar* Use and Derivative Use Immunity Inquiry.

The final step in the act of production analysis mandated by *Hubbell* is the *Kastigar* immunity inquiry. If a court answers the two questions above in the affirmative, finding that an act of production of documents is both testimonial and incriminating, then the court will uphold a witness's assertion of the privilege against self-incrimination and will not grant a motion to compel production by the prosecution. In that situation, the prosecution still can overcome the witness's assertion of the Fifth Amendment privilege against self-incrimination and obtain the subpoenaed documents by granting the witness immunity. If the prosecution grants use and derivative use immunity for the act of production, it can obtain the documents, as it did in *Hubbell*, but in doing so it may forfeit the opportunity to prosecute the witness who produces the documents. The Supreme Court in *Hubbell* left no question that if immunity is granted, the government must meet the heavy *Kastigar*

390 On rare occasions courts have concluded that an assertion of the privilege against self-incrimination as frivolous or unwarranted. *See, e.g.*, Steinbrecher v. Commissioner, 712 F.2d 195, 197-98 (5th Cir. 1983) ("The taxpayers' argument that they were entitled to rely on the fifth amendment in refusing to file adequate returns and to comply with the orders of the Tax Court is frivolous. The fifth amendment privilege against self-incrimination protects an individual from being compelled to disclose information that could reasonably be expected to furnish evidence needed to prosecute the claimant for a crime. It, therefore, applies only when the possibility of self-incrimination is a real danger, not a remote and speculative possibility. The claimant must be faced with substantial hazards of incrimination from the information sought, and: 'The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified.'") (internal citations omitted); McCoy v. Commissioner, 696 F.2d 1234, 1236 (9th Cir. 1983) ("The McCoys may not invoke the Fifth Amendment privilege against self incrimination to justify their refusal to comply with discovery. A valid Fifth Amendment objection may be raised only to questions which present a 'real and appreciable danger of self-incrimination.' If the threat is remote, unlikely, or speculative, the privilege does not apply, and while the claimant need not incriminate himself in order to invoke the privilege, if the circumstances appear to be innocuous, he must make some 'positive disclosure' indicating where the danger lies. The McCoys flatly refused to justify his fear of criminal prosecution. Their Fifth Amendment claim therefore must be rejected.") (internal citations omitted).

burden.[391] As discussed above,[392] in most cases it will be exceedingly difficult for the government to make the showing required by *Kastigar*.[393]

C. How Will *Hubbell* Affect the Investigation of White Collar Crime?

Does this mean that *Hubbell* will effectively preclude the government from obtaining documents from an individual and subsequently prosecuting that individual? The answer to that question might be closer to "yes" if the only means of obtaining documents available to the prosecution was to compel production by issuing a subpoena duces tecum. That is not the case, however, because the prosecution has an alternative means of obtaining documents; it can seek to obtain a search warrant and seize the documents itself. This alternative raises no Fifth Amendment issue because there is no act of production and, thus, no "testimony," by the individual who possesses the documents. This is the second major potential impact of *Hubbell*: prosecutors may use search warrants in many cases where they previously would have issued subpoenas.

Whether or not *Hubbell* will make search warrant more attractive to prosecutors than subpoenas duces tecum in white collar criminal investigations is a difficult question. Prosecutors still must persuade a neutral magistrate that the Fourth Amendment's probable cause and particularity requirements are satisfied before the warrant will be issued. In the past, prosecutors were able to avoid meeting these requirements by issuing a subpoena to the individual they believed might have possession or control of the evidence they were seeking. Even if the subpoenaed witness asserted the act of production privilege, the prosecutor could overcome the privilege by granting act of production immunity. The contents of the subpoenaed documents could then be used in the investigation and prosecution of the witness. After *Hubbell*, however, prosecutors who take the subpoena approach may face a burden that is

391 *See Hubbell*, 530 U.S. at 45 ("*Kastigar* requires that respondent's motion to dismiss the indictment on immunity grounds be granted unless the government proves that the evidence it used in obtaining the indictment and proposed to use at trial was derived from legitimate sources 'wholly independent' of the testimonial aspect of respondent's immunized conduct in assembling and producing the documents described in the subpoena.").

392 *See supra* Part IV.C.

393 The Supreme Court appears to have recognized this point when it rejected the Independent Counsel's argument in *Hubbell* that the witness should be required to make a showing that "there is some substantial relationship between the compelled testimonial communications implicit in the act of production (as opposed to the act of production standing alone) and some aspect of information used in the investigation or the evidence presented at trial." *Hubbell*, 530 U.S. at 45 (quoting from the Office of Independent Counsel's Brief for United States at 9). In the words of the Court: "We could not accept this submission without repudiating the basis for our conclusion in *Kastigar* that the statutory guarantee of use and derivative use immunity is as broad as the constitutional privilege itself. This we are not prepared to do." *Hubbell*, 530 U.S. at 45-46.

comparable to that presented by the probable cause and particularity requirements for obtaining a search warrant.

If the courts that apply *Hubbell* follow the D.C. Circuit approach and impose a "reasonable particularity" requirement[394] for making a *Fisher/Doe* foregone conclusion showing, then the requirement will differ little from the Fourth Amendment particularity requirement for obtaining a search warrant. Even if the *Hubbell* Supreme Court opinion's less demanding standard of "prior knowledge of either the existence or whereabouts"[395] of documents is employed, the standard is similar to the Fourth Amendment particularity standard. [396] Although further development of the case law will be required to determine precisely how *Hubbell*'s Fifth Amendment act of production "foregone conclusion" standard overlaps the Fourth Amendment's particularity requirement, it is likely that in many cases a prosecutor who could satisfy one test could also satisfy the other.[397]

The other Fourth Amendment requirement for obtaining a search warrant—probable cause—may present a greater hurdle for prosecutors in cases where a search warrant is being considered as an alternative to a subpoena duces tecum. The probable cause requirement may be difficult to meet in those white collar criminal investigations where, at least initially, the purpose of the investigation is to determine whether a crime has been committed.[398] After *Hubbell*, however, the difference may be less significant. Both the Supreme Court[399] and the D.C. Circuit[400] opinions in *Hubbell* contemplate that a witness asserting an act of production privilege must be able to demonstrate that the compelled testimony in fact would be incriminating before a court will conclude that the testimony merits Fifth Amendment protection.[401] If a witness can make this showing, then in many cases a prosecutor also would be able to

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394 *Hubbell*, 167 F.3d at 579.

395 *Hubbell*, 530 U.S. at 45.

396 *See supra* Part III.A.

397 This is particularly true in jurisdictions where courts apply a less strict particularity requirement in case involving complex white-collar crimes. *See supra* note 316.

398 *See* Stuntz, *supra* note 18, at 860 ("The government may be able to generate enough evidence to raise some suspicion, but the evidence (and the suspicion) will often be weak until witnesses have been called and documents examined. Thus, a probable cause standard for subpoenas would end many grand jury investigations before they had begun.").

399 See *Hubbell*, 530 U.S. at 37-38 (noting that Fifth Amendment protection extends to information that may lead to incriminating evidence).

400 See United States v. Hubbell, 167 F.3d 552, 581-82 (1999), *aff'd.*, 530 U.S. 27 (2000) (finding Fifth Amendment protection for threats of incriminating responses).

401 Both courts cited the *Hoffman* test for when testimony is sufficiently incriminating to justify invocation of the privilege. *Compare Hubbell*, 530 U.S. at 38 *and Hubbell*, 167 F.3d at 581. Under Hoffman v. United States, 341 U.S. 479 (1951), and its progeny, a court must conclude that there is a "real and substantial" risk that the testimony might expose the witness to criminal liability in order to uphold the witness's invocation of the privilege. *See* BEALE ET AL., supra note 8, § 7:2 at 7-7 n.2 (collecting cases).

demonstrate probable cause. In the remaining cases, a prosecutor may be unable to obtain a warrant, and *Hubbell* may make the use of an immunity grant to overcome the act of production privilege unattractive. This is not to say that an investigation could not go forward in those cases. If prosecutors were initially unable to meet that burden, they may have to defer obtaining documents from the target of the investigation until they have developed additional evidence from other sources, such as associates or employees of the target.[402]

Although the Fourth Amendment probable cause requirement for obtaining a search warrant may be a greater obstacle than the *Hubbell* foregone conclusion "prior knowledge" requirement, prosecutors who have prior knowledge that is sufficient to meet the latter test often will also be able to meet Fourth Amendment probable cause and particularity requirements and obtain a search warrant.[403] This means that, after *Hubbell*, prosecutors may obtain search warrants in cases—perhaps many cases—where they previously would have issued a subpoena duces tecum.

VI. Conclusion

Hubbell has, at least in practical effect, overruled *Fisher* and restored full, meaningful (as opposed to "act of production") Fifth Amendment protection to most private papers in the possession of an individual. After *Hubbell*, prosecutors are no longer free to use the contents of documents to prosecute a witness after they have immunized that witness's act of producing those documents. If prosecutors can show

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402 Although Professor William J. Stuntz is probably correct that "a probable cause standard for subpoena would end many white-collar criminal investigations before they had begun," *see* Stuntz, *supra* note 18, at 860, many other white-collar investigations would go forward. It also may be that many of those that were stymied by an inability to compel a target to produce documents or to obtain a search warrant for documents were "fishing expeditions" in which the prosecution had no good reason to believe a crime even had been committed.

403 Another commentator has recognized that *Hubbell* is likely to alter the subpoena versus search warrant calculus in white-collar criminal investigations:

> Last Term, in *United States v. Hubbell*, the Supreme Court appeared to conclude that unless the government knows—really knows—of a particular document's existence, a subpoena's target is free to refuse to turn the document over, because the act of producing the document would testify to the fact that it does indeed exist. Of course, if the government really does know that the document exists, and hence knows what is in it (knowledge of contents tends to track knowledge of existence), the government can probably get a warrant to search for and seize the document. Thus, after *Hubbell*, the working rule will be something like the following: When faced with subpoenas for documents, suspects can comply or not as they wish. For its part, the government can search for the evidence it wants, so long as it satisfies the probable cause and warrant requirements.

Stuntz, *supra* note 18, at 865.

prior knowledge of the existence, location, and authenticity of the documents, then the act of production has no testimonial value, and a court must reject a witness's assertion of an act of production privilege. In that case, the prosecution can obtain the documents without an immunity grant and is free to use both the act of production and the contents of the documents to prosecute the witness.

What remains of *Fisher* after *Hubbell*? Everything or nothing, depending on the case. The distinction between the contents of documents and the act of producing documents remains viable, but the significance of that distinction will vary based upon what knowledge the prosecution has when it seeks to compel production of documents. If the government can show prior knowledge of the existence, location, and authenticity of the documents, as it did in *Fisher*, then the act of production privilege is not available to the witness. In those cases, the *Fisher* distinction between contents and the act of production remains valid because the government need not show any knowledge of the contents of the documents. For example, if the government can show that it knows the witness keeps a diary and that the diary is in the witness's possession, then the government can compel production, even if the government has no idea what the diary says. On the other hand, if the government lacks knowledge of whether the witness possesses a particular document or class of documents and is merely engaged in a "fishing expedition," then a witness can assert the act of production privilege, and the three-step, post-*Hubbell* act of production analysis applies. In those cases, little, if anything, remains of the *Fisher* distinction between contents and the act of production.

What is the bottom line? If a document is in the possession of an individual witness (as opposed to a collective entity) and is truly private (in that others, including the government, do not know either that the document exists or the witness possesses it), then after *Hubbell*, that document is fully protected by the Fifth Amendment; in other words, if the witness produces the document pursuant to a grant of use and derivative use immunity, then neither the physical act of production of the document nor the contents of the document can be used against the witness in a subsequent prosecution. This result arguably is more like the holding of *Boyd* than that of *Fisher*. In this regard, the application of the Fifth Amendment to an individual's private papers may have returned very nearly to the level of protection that *Boyd* was understood to provide. It remains to be seen whether this new protection promised by *Hubbell* will be implemented or cut back by the lower federal courts, but it is clear that the seed has been sown for a new interpretation of the Fifth Amendment's application to an individual's private papers. Contrary to

Justice O'Connor's broad statement in *Doe I*,[404] it appears that, after *Hubbell*, the Fifth Amendment provides at least some protection, albeit indirect, for the contents of private papers.

404 "[T]he Fifth Amendment provides absolutely no protection for the contents of private papers of any kind." United States v. Doe, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring).