



Spring 3-1-2001

## Cowboy Prosecutors and Subpoenas for Incriminating Evidence: The Consequences and Correction of Excess

Robert P. Mosteller

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### Recommended Citation

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

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# Cowboy Prosecutors and Subpoenas for Incriminating Evidence: The Consequences and Correction of Excess

Robert P. Mosteller\*

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### I. Introduction

Over the past decade, I have taken a number of western vacations. Each time, I have attended a rodeo. From these experiences, I have gained an abiding respect for the bravery of rodeo cowboys and have become certain that they lack any judgment, as they frequently risk life and limb for paltry prize purses. I have learned of the cowboy culture's view of politics from the fans around me and the off-color "humor" of the rodeo clowns who fill time between events. I have reached two conclusions about these cowboys and the culture they reflect. First, Bill Clinton is widely detested. Second, these cowboys do not give a damn what may get broken as they careen about the arena attempting to better a beast. These characteristics seem important for understanding the Office of Independent Counsel (OIC) in litigating *United States v. Hubbell*<sup>1</sup> as well. The OIC's recklessness severely impaired the value of use immunity applied to subpoenas for documents from the perspective of prosecutors. The OIC's crude overreaching was fortuitous because it exposed the dangerous implications of allowing prosecutors to subpoena incriminating evidence from targets and then use that evidence to convict, and it prompted a strong corrective response from the Court.<sup>2</sup>

1. 120 S. Ct. 2037 (2000).

2. See *United States v. Hubbell*, 120 S. Ct. 2037, 2047 (2000) (expressing "no doubt" that Fifth Amendment protects against compelled disclosure of "existence of sources of potentially incriminating evidence").

The Supreme Court's Fifth Amendment document-production and use immunity decisions have been complicated and occasionally sweeping in their pronouncements.<sup>3</sup> However, due perhaps to the doctrinal complexity, cases repeatedly have included statements that categorical answers are inappropriate.<sup>4</sup> The most prominent features of the opinions in this area have been their cautious step-by-step approach and their obvious solicitousness to the interest of the government in maintaining the usefulness of grand jury subpoenas for documents, even those obtained from potential targets of prosecution.<sup>5</sup> Moreover, while legal rules are often complicated, the application of the Fifth Amendment and use immunity to the act of producing documents subpoenaed by a grand jury is particularly esoteric.<sup>6</sup> This was not the place for prosecutors recklessly to disregard the Court's cautiously favorable disposition to their position and to ignore the intricate, and therefore likely fragile, character of the doctrine.

Acting directly against Webster Hubbell, but no doubt in actual pursuit of William Jefferson and Hillary Rodham Clinton, the prosecutors in the OIC entered this arena. Their arrival was something akin to rodeo cowboys riding a bucking bronco or an enraged bull through a china shop. Things did get broken. Although the exact consequences of such blunt and overwhelming force are not yet clear, the relevant doctrines have been altered significantly, and the potential for prosecutorial excesses curtailed. Granting use immunity

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3. See *Brasswell v. United States*, 487 U.S. 99, 108-17 (1988) (ruling that compelling custodian of corporate records to produce organization's records does not violate Fifth Amendment and therefore, immunity not required despite corporation's small size and incriminating nature of records).

4. See *Fisher v. United States*, 425 U.S. 391, 410 (1976) (discussing testimonial and incriminating aspects of production and noting that "[t]hese questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof"); see also *Brasswell*, 487 U.S. at 103 (quoting *Fisher* on this point); *United States v. Doe*, 465 U.S. 605, 613 (1984) [hereinafter *Doe I*] (same).

5. See, e.g., *Braswell*, 487 U.S. at 115 (limiting scope of privilege by stating that "[w]e note further that recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities"); *Doe I*, 465 U.S. at 617 n.17 (rejecting defendant's argument that grant of use immunity must cover contents of business records as well as act of production on basis that immunity need only protect defendant from self-incrimination that might "accompany" production).

6. See generally Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27 (1986); Robert Heidt, *The Fifth Amendment Privilege and Documents - Cutting Fisher's Tangled Line*, 49 MO. L. REV. 439 (1984); Kenneth J. Melilli, *Act-of-Production Immunity*, 52 OHIO ST. L.J. 223 (1991); Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1 (1987); Richard A. Nagareda, *Compulsion "to Be a Witness" and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575 (1999); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227 (1988).

entails great risks, and prosecutors are now generally in a much weaker position than before OIC cowboys' wild ride.

This Article deals with an application of the Fifth Amendment that is important to prosecutors in the modern world where crimes are committed with both documents and weapons. I believe this area of the law should be treated as an actual part of the Fifth Amendment rather than as a technical aside. However, I do not dwell on the philosophical basis of the privilege against compulsory self-incrimination. I have no doubts that the privilege can be defended. I believe the privilege against self-incrimination is a central part of our criminal justice system and basic traditions, regardless of whether the underlying purpose of the privilege against self-incrimination is to prevent overreaching by the state, to create a fair balance between the state and the individual, or to protect a critical aspect of human dignity.<sup>7</sup>

One reason I do not discuss these theoretical issues is that I do not find them determinative of whether the *Hubbell* case was rightly decided or how the Fifth Amendment doctrine should apply to the act of production and use immunity. Under any acceptable theory, the prosecution's actions in *Hubbell* were constitutionally unacceptable, and the difficult remaining questions are unresolved regardless of the theory chosen. I also do not pursue the historical and linguistic analysis of Justices Thomas and Scalia.<sup>8</sup> Such analysis is obviously an important component of constitutional interpretation, and it occasionally resolves issues.<sup>9</sup> However, its application usually is ambiguous and provides an incomplete answer to complex questions.<sup>10</sup>

7. See, e.g., *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (reciting justifications for privilege against self-incrimination). I accept as a plausible argument, but am not yet persuaded that the privilege encourages accuracy in fact-finding by requiring the government to establish its case independently. See *id.* (stating that privilege against self-incrimination requires government to bear entire burden of proof); cf. *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) (explaining that involuntary convictions are not excluded because of likelihood that they are untrue, but because procedures are offensive to our basic values).

8. See *United States v. Hubbell*, 120 S. Ct. 2037, 2050 (2000) (Thomas, J., concurring) (arguing that, according to usage of term "witness" at time amendment was adopted, Fifth Amendment's use of "witness" may have been intended to protect against compelled testimony and compelled evidence); *White v. Illinois*, 502 U.S. 346, 365 (1992) (Scalia, J., concurring) (suggesting that similar analysis supported different understanding of term "witness against him" in Confrontation Clause of Sixth Amendment).

9. I do not denigrate the historical analysis of the meaning of language in the Constitution, such as was done by Professor Nagareda regarding the meaning of "to be a witness" in the Fifth Amendment. See generally Nagareda, *supra* note 6 (analyzing Fifth Amendment). Indeed, I have attempted a similar task regarding the meaning of "witnesses against him" in the Confrontation Clause of the Sixth Amendment. Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 ILL. L. REV. 691, 748-49. Rather, my position is that these types of analyses rarely are clear or dispositive.

10. Moreover, such an analysis has a predictable restrictive impact on rights, which were few and far between at the time of the framing by modern standards. See e.g., *Massiah v.*

My analysis, instead, is founded on a combination of traditional doctrinal analysis, some pragmatism and prudential "balancing,"<sup>11</sup> and a basic devotion to an intuitive sense of what I believe the core meaning of the Fifth Amendment is and should be in American legal and political culture. That core meaning revolves around a commitment against an inquisitorial model of prosecution that can demand communications from the target of potential criminal charges – communications upon which the prosecution will build its case.<sup>12</sup> This model of prosecution is out of kilter with our basic values.

The major subject of this Article is the reshaped act of production doctrine. This Article focuses particularly on the fearsome consequences of prosecution granting use immunity to a potential target of an investigation after *Hubbell*. Fatal consequences to future prosecutorial use of an item of evidence may flow anytime a subpoena requires the target to employ truth-telling in producing the item. This is a very broad formulation of when the

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United States, 377 U.S. 201 (1964) (developing right of counsel at critical stages of proceedings to protect against questioning by law enforcement agents, which was devoid of historical antecedents at time of Sixth Amendment's framing). Reliance upon this method of constitutional interpretation may reveal as much about the politics of those who build their jurisprudence upon it as it does about its interpretive merits.

11. Although the Court only occasionally explicitly acknowledges that it is engaging in the balancing of rights and interests, *see, e.g.*, *California v. Byers*, 402 U.S. 424, 427 (1971) (plurality opinion) (balancing public need against individual's claim to constitutional protection under Fourth Amendment), and while the results of that process certainly are not always clearly defensible, *see id.* (holding that statute requiring driver involved in accident to stop and provide identification does not violate Fifth Amendment), such balancing is and realistically must be a part of the development of constitutional rights. *See* 3 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 8.12(c), at 244 (2d ed. 1999) (arguing that although not articulated as such by Court, similar balancing is presumably at core of Fifth Amendment required records doctrine).

12. In condemning coerced confessions, Justice Frankfurter stated, "[O]urs is an accusatorial and not an inquisitorial system – a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Richmond*, 365 U.S. at 541. Similarly, in *Watts v. Indiana*, 338 U.S. 49 (1949), he observed:

Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation.

*Id.* at 54 (citation omitted). The methods used by the prosecution in *Hubbell* admittedly were unlike those employed to coerce a confession, and a basic issue in the case was whether any communication at all was required from him. However, I believe, and the Court concluded, that a fair analysis of the OIC's actions were squarely within the types of practices condemned by Frankfurter as contrary to our system's fundamental character.

Fifth Amendment is triggered. The subplot of this Article, developed in Part II, examines OIC's recklessness in its myopic pursuit of the President and First Lady and the negative impact on long-term prosecutorial interests.<sup>13</sup> It is but a small addition to the volumes that have been written about the serious flaws in the structure of the OIC.<sup>14</sup> This particular installment suggests the pernicious consequences of separating prosecutors from broad institutional objective of doing public justice in a wide range of cases.

This Article then turns to *Hubbell*'s impact on the act of production doctrine and the prosecution's ability to use evidence after granting the target immunity. Part III briefly reviews the basic elements of the complicated act of production and use immunity doctrines.<sup>15</sup> Part IV considers the immediate impact of the *Hubbell* decision, which holds that when the prosecution does not have specific information about the existence of incriminating documents, demanding them violates the Fifth Amendment, and granting use immunity places the contents of those documents off limits to the prosecution.<sup>16</sup> Part V analyzes *Hubbell*'s potential to narrow the usefulness of subpoenas directed to targets, even when the prosecution can prove that the requested items exist and have been in the target's possession.<sup>17</sup> The highlight here is an illuminating set of hypotheticals that were posed during the *Hubbell* litigation.<sup>18</sup> These hypotheticals made it impossible to ignore the troubling implications of approving the prosecution's position. Two issues remain unresolved: (1) whether lack of knowledge of the immediate location of the subpoenaed items will carry the same consequences as lack of knowledge of their existence; and (2) how directly incriminating possession of the item must be when established through the act of production. This Article concludes by setting out, in Part VI, how the *Hubbell* case may have completely reformulated the

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13. See *infra* Part II (examining negative impact on long-term prosecutorial interests created by OIC).

14. See, e.g., William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197, 1199 (1999) (faulting statute for dividing executive authority and responsibility to prosecute crime); Christopher H. Schroeder, *Putting Law and Politics in the Right Places—Reforming the Independent Counsel Statute*, 62 LAW & CONTEMP. PROBS., Winter 1999, at 163, 176 (noting that, by virtue of statute's requirements and other factors, such as lack of budgetary restraint, OIC prosecutions tend to lack proportionality and involve over-investigation).

15. See *infra* Part III (analyzing basic components of act of production doctrine).

16. See *infra* Part IV (considering *Hubbell*'s immediate impact on limiting prosecution's use of subpoenaed documents acquired by granting use immunity).

17. See *infra* Part V (examining potential limits to usefulness of subpoenas directed to targets).

18. See *infra* Part V.B.1 (examining hypotheticals posed, inter alia, in court of appeals opinion and Supreme Court argument).

law of subpoenaing and using items from targets.<sup>19</sup> For individual defendants, such a result may be lawful only when the government has precise information on both the existence and the immediate location of the item. Prosecutors, very frequently, will lack this information.

## II. *The Cowboys' Reckless Ride*

In August 1994, the original grant of authority was given to the OIC to investigate James McDougal, President Bill Clinton, and First Lady Hillary Rodham Clinton in connection with Madison Guaranty Savings & Loan and the White Water Development Corporation.<sup>20</sup> In September 1994, the OIC began its formal pursuit of Webster Hubbell, former law partner of the First Lady. The OIC requested referral of Hubbell, who was covered by 28 U.S.C. § 591(b),<sup>21</sup> for mail fraud and tax evasion charges while he was a member of the Rose Law Firm where he and Mrs. Clinton had practiced law.<sup>22</sup> The Independent Counsel brought charges against Hubbell later that year, and in December 1994, Hubbell pled guilty to felony charges of mail fraud and tax evasion.<sup>23</sup> He was sentenced to prison for twenty-one months and was incarcerated from August 1995 until February 1997.<sup>24</sup>

While Hubbell was in prison, the OIC again applied prosecutorial pressure. On November 1, 1996, it served him with a subpoena commanding "the production of all his business, financial, and tax records from January 1, 1993 to the date of the subpoena."<sup>25</sup> The OIC's ultimate goal was to uncover evi-

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19. See *infra* Part VI (concluding that *Hubbell* may have completely altered current law of subpoenaing).

20. *United States v. Hubbell*, 11 F. Supp. 2d 25, 27 (D.D.C. 1998), *rev'd, vacated by* 167 F.3d 552 (1999), *aff'd*, 120 S. Ct. 2037 (2000).

21. See 28 U.S.C. § 591(b) (1994) (designating individuals subject to statute).

22. *Hubbell*, 11 F. Supp. 2d at 28.

23. *Id.*

24. *Id.*

25. *Id.* at 33. The subpoena commanded Hubbell to appear and testify before the grand jury of the United States District Court for the Eastern District of Arkansas on November 19, 1996, and to bring with him the following documents:

A. 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 Webster Hubbell, his wife, or children from January 1, 1993 to the present, including but not limited to the identity of employers or clients of legal or any other type of work.

B. 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 Webster Hubbell, his wife, or children from January 1, 1993 to the present, including but not limited to billing memoranda, draft statements, bills, final statements, and/or bills for work performed or time billed from January 1, 1993 to the present.



C. Copies of all bank records of Webster Hubbell, his wife, or children for all accounts from January 1, 1993 to the present, including but not limited to all statements, registers and ledgers, cancelled checks, deposit items, and wire transfers.

D. Any and all documents reflecting, referring, or relating to time worked or billed by Webster Hubbell from January 1, 1993 to the present, including but not limited to original time sheets, books, notes, papers, and/or computer records.

E. Any and all documents reflecting, referring, or relating to expenses incurred by and/or disbursements of money by Webster Hubbell during the course of any work performed or to be performed by Mr. Hubbell from January 1, 1993 to the present.

F. Any and all documents reflecting, referring, or relating to Webster Hubbell's schedule of activities, including but not limited to any and all calendars, day-timers, time books, appointment books, diaries, records of reverse telephone toll calls, credit card calls, telephone message slips, logs, other telephone records, minutes, databases, electronic mail messages, travel records, itineraries, tickets for transportation of any kind, payments, bills, expense backup documentation, schedules, and/or any other document or database that would disclose Webster Hubbell's activities from January 1, 1993 to the present.

G. Any and all documents reflecting, referring, or relating to any retainer agreements or contracts for employment of Webster Hubbell, his wife, or his children from January 1, 1993 to the present.

H. Any and all tax returns and tax return information, including but not limited to all W-2s, form 1099s, schedules, draft returns, work papers, and backup documents filed, created or held by or on behalf of Webster Hubbell, his wife, his children, and/or any business in which he, his wife, or his children holds or has held an interest, for the tax years 1993 to the present.

I. Any and all documents reflecting, referring, or relating to work performed or to be performed or on behalf of the City of Los Angeles, California, the Los Angeles Department of Airports or any other Los Angeles municipal Governmental entity, Mary Leslie, and/or Alan S. Arkatov, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions.

J. Any and all documents reflecting, referring, or relating to work performed or to be performed by Webster Hubbell, his wife, or his children on the recommendation, counsel or other influence of Mary Leslie and/or Alan S. Arkatov, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions.

K. Any and all documents related to work performed or to be performed for or on behalf of Lippo Ltd. (formerly Public Finance (H.K.) Ltd.), the Lippo Group, the Lippo Bank, Mochtar Riady, James Riady, Stephen Riady, John Luen Wai Lee, John Huang, Mark W. Grobmyer, C. Joseph Giroir, Jr., or any affiliate, subsidiary,

dence of obstruction of justice,<sup>26</sup> and it is unlikely that Hubbell was the real target.<sup>27</sup>

Before Hubbell's appearance at the grand jury, his attorney, John Nields, talked and exchanged letters with the OIC about Hubbell's assertion of the Fifth Amendment with respect to production of the documents.<sup>28</sup> They also discussed the consequences of the OIC granting use immunity to overcome Hubbell's privilege claim.<sup>29</sup> Nields made a broad claim regarding the effect of granting use immunity, contending that it would "operate so as to prevent any evidentiary use of the documents against" his client.<sup>30</sup> The OIC disagreed, asserting instead that use immunity would only bar "introducing the act of

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or corporation owned or controlled by or related to the aforementioned entities or individuals, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions.

United States v. Hubbell, 120 S. Ct. 2037, 2048-49 (2000).

26. United States v. Hubbell, 11 F. Supp. 2d 25, 28 (D.D.C. 1998), *rev'd, vacated by* 167 F.3d 552 (1999), *aff'd*, 129 S. Ct. 2037 (2000) (quoting grant of jurisdiction to investigate obstruction of justice); *see also* United States v. Hubbell, 120 S. Ct. 2037, Joint App. at 91 (2000) (containing transcript of Motions hearing of June 26, 1998, United States v. Hubbell, 11 F. Supp. 2d 25 (D.D.C. 1998) (No. CR98-151-01-04)) [hereinafter Motions Hearing Transcript] (noting that OIC counsel stated that prosecution was looking for obstruction of justice as Hubbell was believed to have received hush money not to cooperate with Whitewater investigation).

27. *See* Motions Hearing Transcript, *supra* note 26, at 102-03 (stating that defense counsel Nields speculated upon receiving subpoena that OIC was in fact seeking evidence to determine if someone else had committed crime, but when that initial expectation was not realized, evidence was used to prosecute Hubbell).

28. *See* Letter from John D. Bates, Deputy Independent Counsel, & Kenneth W. Starr, Independent Counsel, to John W. Nields, Jr., Counsel to Webster Hubbell (Nov. 8, 1996) *in* United States v. Hubbell, 120 S. Ct. 2037, Joint App. at 54-56 (2000) [hereinafter Bates & Starr Letter] (countering Hubbell's Fifth Amendment privilege argument); Letter from John W. Nields, Jr., Counsel to Webster Hubbell, to John D. Bates, Deputy Independent Counsel (Nov. 12, 1996) *in* United States v. Hubbell, 120 S. Ct. 2037, Joint App. at 57-58 (2000) [hereinafter Nields Letter] (discussing application of Fifth Amendment issues to production of evidence and referring to earlier telephone conversation regarding the same issues).

29. *See generally* Bates & Starr Letter, *supra* note 28 (contending that grant of use immunity would merely prohibit government from introducing evidence that documents were produced, while not protecting use of document's contents); Nields Letter, *supra* note 28 (countering OIC's immunity argument and noting disagreement in courts on this point).

30. *See* Bates & Starr Letter, *supra* note 28, at 1 (recounting, *inter alia*, Nields's legal argument).

production," but not use of the contents, against Hubbell.<sup>31</sup> OIC prosecutors were prepared to proceed either by granting formal immunity pursuant to the statute or informal immunity by letter.<sup>32</sup>

In response, Nields stated that he thought the two sides shared the view that the Fifth Amendment protected production of documents when a party is "implicitly forced to say whether documents or other things are in existence and under his control."<sup>33</sup> He noted, however, the OIC's disagreement with his positions, both that the documents produced are "the fruit of the compelled act of production"<sup>34</sup> and that the immunity statute would treat those documents as derived from the act of production.<sup>35</sup> Given the disagreement, Nields insisted that his client receive full formal immunity under the terms of the statute.<sup>36</sup>

Because of the position taken by Nields, the prosecution obtained an order from the District Court compelling Hubbell to produce documents under immunity before Hubbell's scheduled grand jury appearance.<sup>37</sup> When Hubbell was asked in the grand jury to produce the documents, he asserted his Fifth Amendment privilege and declined "to state whether there are documents within [his] possession, custody, or control responsive to the Subpoena."<sup>38</sup> Upon presentation of the court order that demanded production of the listed documents and granted use immunity "to the extent allowed by law,"<sup>39</sup> Hubbell produced 13,120 pages of financial records.<sup>40</sup>

As a consequence of the information contained in the subpoenaed records, Hubbell, his wife, accountant, and tax lawyer, were indicted on conspiracy,

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31. *Id.* at 3.

32. *Id.*

33. Nields Letter, *supra* note 28, at 1.

34. *Id.*

35. *Id.* at 2.

36. *Id.* at 3. Nields sought assurance from the prosecution that it did not contend that it could force production or that it could limit immunity protection to something less than the full extent of the immunity statute. Nields asked to be notified if the OIC made such a claim. *Id.* The OIC apparently did not respond with such a claim, and while it argued that the law provided only narrow protection, it did not argue that the scope of Hubbell's immunity was less than the statute ordinarily provided. *Id.* at 1-3.

37. Brief for Respondent Hubbell at 5, *United States v. Hubbell*, 120 S. Ct. 2037 (2000) (No. 99-166) [hereinafter Brief for Respondent Hubbell].

38. *United States v. Hubbell*, 120 S. Ct. 2037, Joint App. at 62 (2000) [hereinafter Joint App.] (containing transcript of Grand Jury testimony of Nov. 19, 1996 (No. GJ-96-3)).

39. *Id.* at 64; *id.* at 61 (containing Court Order of Nov. 14, 1996 (No. GJ-96-3)); *see also* 18 U.S.C. § 6002 (1995) (granting immunity to subject of proceeding when compelled to testify or give information protected by privilege against self incrimination).

40. *United States v. Hubbell*, 11 F. Supp. 2d 25, 27 (D.D.C. 1998), *rev'd, vacated by* 167 F.3d 552 (1999), *aff'd*, 120 S. Ct. 2037 (2000).

mail and wire fraud, and various tax offenses involving efforts to keep Hubbell's income, particularly his income from consulting fees, away from creditors and the Internal Revenue Service.<sup>41</sup> The parties agreed on two important points regarding the subpoenaed documents. First, Hubbell's indictment was based on these documents, and prosecutors would have used evidence derived from their contents to prosecute him.<sup>42</sup> Second, the government would not introduce the actual documents or refer in any way to Hubbell's production of them in its presentation of evidence.<sup>43</sup>

Although the OIC later would argue that Hubbell's compelled production of the documents did not violate his Fifth Amendment rights,<sup>44</sup> it did not seek to prevail on that legal point before granting use immunity in order to obtain the documents.<sup>45</sup> Whether litigating this issue would have produced benefits to the OIC is unclear,<sup>46</sup> and it might have resulted in substantial

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41. *United States v. Hubbell*, 167 F.3d 553, 556 (D.C. Cir. 1999), *aff'd*, 120 S. Ct. 2037 (2000); *Hubbell*, 11 F. Supp. 2d at 28.

42. Brief for Petitioner OIC at 3, *United States v. Hubbell*, 120 S. Ct. 2037 (2000) (No. 99-166) [hereinafter Brief for Petitioner OIC] (admitting that documents produced were used in investigation that led to indictment and asserting that government, to prove its case, had no need to use actual documents produced or evidence that Hubbell possessed them); *United States v. Hubbell*, 120 S. Ct. 203, 2047-48 (2000) (noting that government makes no claim that evidence it used to obtain indictment and proposed to use at trial came from sources independent of documents produced).

43. *Hubbell*, 11 F. Supp. 2d at 35; Brief for Petitioner OIC, *supra* note 42, at 3 (noting that government to prove its case had no need to use actual documents produced or evidence that Hubbell possessed documents); *Hubbell*, 120 S. Ct. at 2046 (repeating government's position that it would not have needed to introduce any of documents at Hubbell's trial). The defense did not know that the government's claim would be carried out because trial had not yet occurred. However, the defense did not contest the prosecution's intention to limit its evidence or assert that the actual documents produced would necessarily be used in the prosecution.

44. *Hubbell*, 167 F.3d at 579-82 (discussing OIC's arguments that act of production was not testimonial because government knew that Hubbell as businessman possessed classes of business, consulting, and tax records and that act was not incriminating).

45. Nields argued in his brief to the Supreme Court that the OIC had waived the right to contend that the act of production did not violate the Fifth Amendment on the grounds that it was not communicative. Brief for Respondent Hubbell, *supra* note 37, at 36. However, the court of appeals had ruled on that issue, *Hubbell*, 167 F.3d at 579-82, and the Supreme Court ignored Hubbell's waiver claim.

46. If granting immunity is constitutionally required, then an erroneous denial of the target's Fifth Amendment claim by a trial judge that is later reversed on appeal would leave the prosecutor in the same, or even worse, position than she would have occupied if she had granted immunity to develop a new prosecution based on untainted evidence. However, if the trial judge rules correctly and the outcome is not altered on appeal, litigating and even losing the privilege issue would give the prosecution a beneficial signal to narrow the subpoena's demand to evidence not protected by the Fifth Amendment. In addition, the trial court's decision would provide a context for evaluating the costs of compelling production.

delays.<sup>47</sup> In any case, the OIC chose to require immediate production of the documents by granting use immunity with whatever limitations on their use such immunity might carry, and thereby bringing use immunity and its burdens into the litigation.

Moreover, once immunity was granted and the documents were produced, the OIC used those documents to develop a criminal case against Hubbell, which it chose to prosecute.<sup>48</sup> In his brief to the Supreme Court, Nields repeatedly urged that the OIC was unprecedented in beginning its investigation by serving a subpoena upon a potential target and then prosecuting the target for criminal acts disclosed in documents produced under a grant of statutory use immunity.<sup>49</sup>

The OIC's failure to investigate first and issue the subpoena after independently obtaining information about Hubbell left it in no position to establish through a separate investigation that it definitely knew, or would inevitably have discovered, that the subpoenaed documents did in fact exist and were in Hubbell's possession. As discussed below,<sup>50</sup> if enough information existed to establish that existence and possession were "foregone conclusions," Hubbell's Fifth Amendment claim would have been eliminated.<sup>51</sup> However, the OIC had no factual basis to establish this "foregone conclusion."

Another consequence of issuing the subpoena at the beginning of the investigation, rather than after a thorough investigation, may have been that Hubbell felt compelled to disclose a substantial quantity of incriminating information in the response to the subpoena. Samuel Alito has argued that people who have committed crimes generally volunteer incriminating information in response to a subpoena only when they believe that production of the

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47. Except when the target is incarcerated, delay almost always disadvantages the prosecution. I believe that the limited focus of the OIC in *Hubbell* resulted in an even greater than normal prosecutorial aversion to delay. The perceived reasonable time frame for the OIC to complete investigating the Clintons made speedy progress especially important.

48. Brief for Petitioner OIC, *supra* note 42, at 3 (acknowledging that government made "substantial use" of contents of documents in investigation); Motions Hearing Transcript, *supra* note 26, at 6 (presenting OIC statement that "only by virtue of the production of the documents [had it] learned the facts that enabled [it] to then carry out a prosecution").

49. See Brief for Respondent Hubbell, *supra* note 37, at 2 (positing that use of power to grant immunity at outset of investigation to obtain evidence against witness was without precedent).

50. See *infra* Part III.D (reasoning that subject has no legitimate Fifth Amendment claim when prosecution has sufficient evidence of existence and possession).

51. See Brief for Respondent Hubbell, *supra* note 37, at 2 (stating that OIC had to concede that Hubbell's Fifth Amendment claim was valid because OIC had no knowledge of existence of Hubbell's documents and thus could not claim that their existence was "foregone conclusion").

information will be more helpful than harmful.<sup>52</sup> The suspect's decision to disclose may result from the ambiguity of the requested information or the likelihood that it will be unearthed anyway.<sup>53</sup>

Hubbell was denied the chance to wait and see what the government could find on its own and then calculate whether the undiscovered items would likely remain unknown if he did not disclose them. If he falsely denied that the documents existed, a claim that is categorically outside the protection of the privilege against self-incrimination,<sup>54</sup> then the documents would remain subject to independent discovery. Hubbell must have understood that some of the documents would certainly be unearthed. If he was a calculating man, then Hubbell likely judged that he had no real option but to reveal a substantial volume of incriminating documents. Given that determination, he might well have determined that it was in his best interest to be fully forthcoming and gamble on winning his legal argument that any prosecution occurring after the production order and immunity would violate his constitutional rights.<sup>55</sup>

The actions taken by the OIC against Hubbell appear quite unusual and uncomfortably inquisitorial. However, when the person receiving the subpoena

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52. See Alito, *supra* note 6, at 47 (asserting that rational, unscrupulous witness will comply with subpoena *duces tecum* only if neither document, nor his possession of it, is incriminating or if nonproduction is equally as incriminating as production).

53. See *id.* (hypothesizing that when possession can be shown or is expected, witness may produce subpoenaed document or object hoping it will prove less damaging than nonproduction or assuming that it would be discovered in any event). Whether Alito's arguments were applicable to Hubbell is unknown, but they certainly are sensible when applied to guilty persons faced with a demand for incriminating documents. A defendant's freedom to act dishonestly when in his or her self-interest may be curtailed severely by the ethical obligations of defense counsel if the existence of the documents is known to counsel. In this discussion, I do not mean to suggest in any way that Hubbell's counsel entertained the possibility of permitting a false response.

54. The Fifth Amendment does not protect perjury even in the face of compulsion, and a witness clearly can be prosecuted for perjury if he or she lies after being given immunity. See *United States v. Apfelbaum*, 445 U.S. 115, 126-32 (1980) (ruling that Fifth Amendment does not protect witness against perjury after grant of immunity); *United States v. Wong*, 431 U.S. 174, 178 (1977) (recognizing prior holding that Fifth Amendment privilege does not condone perjury); *United States v. Mandujano*, 425 U.S. 564, 577-78 (1976) (plurality opinion) (recognizing that without exception, Supreme Court jurisprudence forbids perjury even where government exceeded constitutional powers in making inquiry); *Glickstein v. United States*, 222 U.S. 139, 141-42 (1911) (ruling that immunity afforded by constitutional guarantee does not endow witness with license to commit perjury).

55. After the ruling in *Hubbell*, granting immunity generally may have the even stronger effect of encouraging disclosure of incriminating documents as a matter of the target's self-interest. Disclosing items arguably covered by the subpoena that the government has no knowledge of may effectively immunize the target against the use of those documents. Thus, targets may make calculations that take advantage of the opportunity to taint incriminating documents by producing them under the demand of an ambiguous or broadly drawn subpoena.

is a "small fry" in an organization and the prosecutor's goal for the "fishing expedition" is that it will produce evidence to land other, bigger fish, it may not be so unusual for a prosecutor to issue a broad subpoena without specific knowledge of the existence of the documents sought or that the individual receiving the subpoena has them in his possession or control. When the OIC went after evidence of obstruction of justice involving Hubbell, a small fish, it may have intended to catch bigger fish, the Clintons.<sup>56</sup> The OIC may not have intended that Hubbell be prosecuted. Instead, the OIC may have hoped that the records produced would lead to evidence of a conspiracy to support Hubbell financially and to keep him quiet, with the President and First Lady orchestrating that conspiracy.

The subpoena was very unusual indeed if, as Nields argued, Hubbell was the intended target from the beginning of the OIC's investigation. The absence of reported cases like Hubbell's indicates either that the Justice Department can tell the difference between underlings and major targets, or that it accepts its error when, by mistake, it initially goes after what turns out to be its major or only catch. In Hubbell's case, by contrast, either the OIC could not do the former, or it would not do the latter.

In my judgment, three decisions of the OIC coalesced to put the government in an extremely unattractive and precarious litigation posture that likely influenced the Supreme Court's potentially expansive decision undermining the future of use immunity applied to documentary subpoenas. First, the OIC opened its investigation of Hubbell with a broadly drafted subpoena without first securing independent sources of information. Second, in response to Hubbell's Fifth Amendment claim, it immediately granted use immunity rather than litigating whether his claim satisfied the testimonial communication and incrimination elements of the Fifth Amendment privilege. Third, upon failing to uncover evidence to transfer the OIC's attention from its initial target to a larger catch, the OIC nevertheless prosecuted Hubbell. Each decision might have been made by a regular prosecutor. However, the myopic nature of the OIC's assignment and its limited time frame made the decisions far more likely. In addition, the OIC was independent of, and insulated from, larger institutional interests that might have caused ordinary federal prosecutors to weigh carefully the consequences of combining these three decisions and have possibly stopped the process.

These three decisions produced a frontal challenge to Fifth Amendment restraint on the use of the subpoena power to investigate crime, yet they did not provide any easy way out for judges concerned about approving the use of an

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56. Nields made this suggestion in his district court argument. Motions Hearing Transcript, *supra* note 26, at 102-03.

investigative mechanism with quite an inquisitorial feel to American sensibilities.<sup>57</sup> Hubbell was being prosecuted for crimes of which the government had no knowledge or even concrete suspicions until Hubbell himself provided his personal business records. He was obligated to produce these documents or face imprisonment, and to the extent required by the Fifth Amendment regarding their production, he was guaranteed immunity from their use to prosecute him.

Jurists at every level of this case were moved to ask difficult questions probing the implications of approving the government's conduct and seeking limits to the government's claim of entitlement to act as it had against Hubbell.<sup>58</sup> The OIC put these judges and justices in that uncomfortable position. Further, the OIC had no readily available way to give the jurists the desired reassurance and did not even attempt to ease their discomfort. The OIC's prosecutors had either to concede a constitutional violation or prevail on one of two "home run" positions that would give clear authorization for broad and largely unfettered use of subpoenas to compel targets like Hubbell to provide the basis for their own prosecution. The Solicitor General's Office might have wanted to force the issue in such a stark fashion for a clear vindication of a legal position, but I doubt it would have wanted to litigate the case in a factual and legal context that so diminished its chances of prevailing.

Given these decisions, the *Hubbell* opinion still might have remained a troubling decision for the government, but only by a divided panel of the District of Columbia Circuit. Having pursued their two "home run" strategies and lost in the district court, the OIC appealed, as it should have done, given that the district court also ruled that the office had exceeded its jurisdiction.<sup>59</sup> OIC prevailed on the jurisdictional issue under a decision of a divided panel of the District of Columbia Circuit.<sup>60</sup> On the Fifth Amendment issue (also by

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57. Whether what I argue to be the basic anti-inquisitorial tradition of American criminal procedure in fact has been applied generally to the doctrines governing the production of documents at least is debatable. Prior to *Hubbell*, this highly technical area may have been viewed as developing on its own and exhibiting a separate tradition. Its highly technical nature and the complicated and compartmentalized treatment given Fifth Amendment issues by *Fisher* permitted such a perspective. Before *Hubbell*, it arguably had become almost a constitutional aside from much of modern Fifth Amendment doctrine.

58. See *infra* Part V.B.1 (positing that government lawyers could not have been comforted by hypotheticals posed by bench because they reveal Court's apprehension as to implications of government's view).

59. See *United States v. Hubbell*, 11 F. Supp. 2d 25, 29-33 (D.D.C. 1998), *rev'd, vacated* by 167 F.3d 552 (1999), *aff'd*, 120 S. Ct. 2037 (2000) (finding that investigation of Hubbell exceeded jurisdiction of OIC because referral order exceeded authority of Special Division to expand jurisdiction).

60. *United States v. Hubbell*, 167 F.3d 552, 556-63 (D.C. Cir. 1999), *aff'd*, 120 S. Ct. 2037 (2000) (dismissing jurisdictional challenge).



a divided vote, but with a different combination of judges), the circuit court remanded the case to the district court for further proceedings to determine whether the OIC could meet its burden under the "foregone conclusion" doctrine.<sup>61</sup> The circuit court further concluded that, if the OIC could not meet its burden as to the existence of those documents, Hubbell's constitutional rights had been violated by improper use of the contents of those documents under the use immunity doctrine.<sup>62</sup> The OIC sought rehearing and rehearing en banc, but the circuit court denied both.

Rather than returning to the district court, the OIC conceded that it could not meet the "reasonable particularity" standard<sup>63</sup> set down by the court of appeals for satisfying the "foregone conclusion" test.<sup>64</sup> Indeed, the OIC made no further showing of its knowledge about Hubbell's records at the time the subpoena was served. Instead, the OIC and Hubbell reached a plea agreement under which the OIC dismissed all counts against the other defendants who had been jointly indicted with Hubbell in exchange for Hubbell's conditional plea of guilty to a misdemeanor regarding part of the conduct covered by the indictment.<sup>65</sup> Under the agreement, Hubbell received no prison time and no fine.<sup>66</sup> The plea was contingent upon the OIC prevailing in the Supreme Court, and if the OIC did not prevail, all charges against Hubbell would be dismissed.<sup>67</sup> On this record and with the extremely marginal prosecutorial interest of securing a misdemeanor conviction without meaningful punishment, the OIC sought certiorari. The *Hubbell* opinion was the result.

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61. *Id.* at 585 (remanding case to determine whether government could establish requisite knowledge of existence and possession of documents sought in subpoena).

62. *Id.* The court included not only existence but also possession in its ruling with regard to "foregone conclusion." *Id.* However, it appeared to link the violation of Hubbell's constitutional rights principally to existence, with possession as merely a subsidiary concern. *Id.* at 582 (finding indirect incrimination specifically only with respect to acknowledging existence of documents). The court stated that "[i]f the government did not have a reasonably particular knowledge of subpoenaed documents' actual existence, let alone their possession by the subpoenaed party, and cannot prove knowledge of their existence through any independent means, *Kastigar* forbids the derivative use of the information contained therein against the immunized party." *Id.* at 585.

63. *Id.* at 579.

64. *See* *United States v. Hubbell*, 120 S. Ct. 2037, 2042 (2000) (noting OIC's concession on remand that it could not meet "reasonable particularity" standard mandated by court of appeals).

65. *See* Brief for Respondent Hubbell, *supra* note 37, at 11 (summarizing terms of plea agreement); Joint App., *supra* note 38, at 106-09 (containing plea agreement setting forth conditions of plea).

66. *See* Brief for Respondent Hubbell, *supra* note 37, at 11 (summarizing sentencing terms); Joint App., *supra* note 38, at 109 (containing plea agreement outlining punishment).

67. *See* Brief for Respondent Hubbell, *supra* note 37, at 11 (stating contingency agreement); Joint App., *supra* note 38, at 109 (setting contingency agreement).

Private litigants often take cases to the Supreme Court despite poor prospects for success. State prosecutors likely do so on occasion as well. However, because of its institutional isolation and its narrow prosecutorial interests, the OIC gave away the advantage the federal government usually has in litigating with the big picture in mind and having the freedom to accept an immediate loss if it serves the government's overall interest. The government had only two basic "home run" positions that would allow it to overcome Hubbell's arguments. It pressed and lost and thereby definitively eliminated the viability of those positions, badly damaged the value to prosecutors of use immunity for documentary subpoenas, likely altered the environment in the lower courts as to documentary subpoenas for years to come, and prompted the Court to condemn these inquisitorial excesses through language that broadly paints the Fifth Amendment protection.<sup>68</sup> In sum, the OIC in *Hubbell* did substantial immediate and long-term damage to prosecutorial interests. While the government may possibly reclaim some of the lost ground in future decisions, the result for the government in *Hubbell* is about as negative as could be expected from the currently constituted Supreme Court. The posture of the case gave the Court very little room other than to decide the case and the law against the government and afforded the Court an opportunity to fashion a decision on broad conceptual grounds.

### III. Act of Production Doctrine and Use Immunity

Assessing whether requiring Hubbell to provide documents would violate his Fifth Amendment privilege involves a set of concepts that collectively are called the "act of production doctrine."<sup>69</sup> This doctrine admittedly is arcane and complicated. The OIC made the picture more complex by compelling production under a grant of use immunity which applied the use immunity doctrine to the act of production. I begin with the basic contours of the application of the Fifth Amendment to producing documents – the act of production doctrine. Primarily, I will discuss the doctrine as applied to documents, though the same principles apply to the production of other tangible objects, such as guns, knives, and contraband.<sup>70</sup> In some of the hypothetical problems

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68. See *infra* Parts IV.C (describing Court's use of broad Fifth Amendment rhetoric to explain nature of violation); Part V.B.1 (analyzing set of hypotheticals used by Court that displayed its concern with potentially inquisitorial aspects of use of subpoenas to gather evidence from those suspected of crime).

69. See *Fisher v. United States*, 425 U.S. 391, 410-13 (1976) (noting that "act of producing evidence" may have communicative aspects that can violate Fifth Amendment and setting out initial propositions from which act of production doctrine has developed).

70. See, e.g., *Dep't of Soc. Serv. v. Bouknight*, 493 U.S. 549, 554-55 (1990) (applying act of production doctrine to requirement that mother deliver her child to authorities under court

discussed later, I will use weapons instead of documents because their more obviously incriminating character makes compelling their disclosure more evocative of Fifth Amendment values.

Under the modern Supreme Court's understanding of the Fifth Amendment, prosecutorial use of documents that were prepared voluntarily does not itself violate the Constitution.<sup>71</sup> Thus, if the government comes to possess those documents without involving the preparer in any way, the Fifth Amendment is not implicated. Moreover, the Fifth Amendment is not involved even if the government seizes those documents through, for example, a search conducted with or without a warrant.<sup>72</sup> In short, use of the contents of voluntarily prepared documents does not directly violate the Fifth Amendment, even if those documents are personal and private and their contents are highly incriminating.<sup>73</sup>

The protections of the Fifth Amendment may be available, however, if the documents are obtained by a grand jury subpoena because responding to the subpoena may involve incriminating testimonial communication. An order requiring the production of pre-existing documents violates the protection against compulsory self-incrimination if: (1) compulsion, (2) testimonial

order); *Commonwealth v. Hughes*, 404 N.E.2d 1239, 1240-45 (Mass. 1980) (applying doctrine to order production of specifically identified revolver).

71. *Fisher*, 425 U.S. at 409-10 (describing how series of decisions compel conclusion that government use of voluntarily prepared documents does not violate Fifth Amendment).

72. *Andresen v. Maryland*, 427 U.S. 463, 470-77 (1976) (holding that search that produced records that previously had been voluntarily prepared did not implicate Fifth Amendment).

73. This position is the culmination of a series of cases that dismantled *Boyd v. United States*, 116 U.S. 616 (1886), which had concluded that a search for private papers violated the Fifth Amendment privilege against self-incrimination. *Id.* at 634-35. One part of the story developed out of Fourth Amendment jurisprudence in cases such as *Warden v. Hayden*, 387 U.S. 294 (1967), which overruled *Gouled v. United States*, 255 U.S. 298 (1921) and allowed for searches for mere evidence, and *Andresen v. Maryland*, 427 U.S. 463 (1976), which ruled that a search for private papers authorized under the Fourth Amendment did not independently offend the Fifth Amendment. Another part of the story proceeded through Fifth Amendment analysis that concludes that the privilege against self-incrimination protects compelled communications or testimony, but does not prohibit obtaining incriminating evidence from the suspect. See *United States v. Wade*, 388 U.S. 218, 221-23 (1967) (holding that compelled participation in lineup did not violate Fifth Amendment); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (holding withdrawal of defendant's blood sample is not violative of Fifth Amendment).

To be entirely fair, the Supreme Court has yet to decide a case involving the seizure of an extremely private document, such as a diary. Occasionally, lower court cases have held that such a seizure violates the Fifth Amendment. See, e.g., *Moyer v. Commonwealth*, 520 S.E.2d 371, 373-76 (Va. Ct. App. 1999) (holding that use of diary violated Fifth Amendment privilege). However, that position clearly is not the generally held view of the law. See *Moyer v. Commonwealth*, 531 S.E.2d 580, 583-87 (Va. Ct. App. 2000) (en banc) (reversing earlier panel decision that found Fifth Amendment violation in seizing defendant's diary under search warrant).

communication, and (3) incrimination are all present. The Court first articulated this general structure in the seminal case of *Fisher v. United States*.<sup>74</sup>

### A. Compulsion

Satisfying the compulsion issue is guaranteed in cases in which a grand jury has commanded production under a subpoena. The subpoena constitutes legal compulsion because it is backed by coercive sanctions, including incarceration as a result of defying an order to produce.

### B. Testimonial Communication

The fact that the underlying documents contain communications made previously by the target does not satisfy the testimonial communication requirement.<sup>75</sup> Instead, communication must be implicit in providing the documents in response to subpoena – communication through the act of production – in order to constitute a testimonial communication by the person responding to the subpoena.<sup>76</sup>

Testimonial communications often result from compliance with the demands of a subpoena. Conceptually, the response to every subpoena for documents answers a set of implicit questions posed by the subpoena. Courts accept that production of documents specified in the subpoena may acknowledge (1) authenticity of the documents or that the responding party at least believes that they are the ones demanded, (2) possession or control of the documents, and (3) the existence of such documents.<sup>77</sup>

### C. Incrimination

Satisfying the incrimination requirement remains murky after *Hubbell*. However, it is clear that the incrimination requirement excludes from consideration trifling or imaginary, as opposed to substantial or real, prospects of

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74. See *Fisher*, 425 U.S. at 408 (asserting that Fifth Amendment applies only when accused is compelled to make incriminating testimonial communication).

75. See *id.* at 409-10 (ruling that if production of documents does not require target to restate, repeat, or affirm truth of the contents, it does not compel testimony regardless of whether items produced contained earlier, voluntarily made communications).

76. See *id.* at 410 (acknowledging that "act of producing evidence" may have communicative aspects as to existence, possession, and authenticity of that evidence).

77. See *United States v. Hubbell*, 167 F.3d 553, 567-68 (D.C. Cir. 1999), *aff'd*, 120 S. Ct. 2037 (2000) (dividing potential communicative aspects of production into four elements and distinguishing between showing authenticity of items and establishing that party responding believed those items were ones specified in subpoena).

incrimination<sup>78</sup> and requires independent judgment rather than the self-sufficient claim of the target.<sup>79</sup>

A major unresolved question is whether the incriminating contents of documents may be considered in determining whether proving possession through the act of production satisfies the incrimination requirement of the Fifth Amendment.<sup>80</sup> Possession of some items is directly incriminating, and it is clear that indirect use of evidence obtained in violation of the privilege against self-incrimination violates the Fifth Amendment.<sup>81</sup> The principal question may be posed as follows: Are the incriminating contents of ordinary documents excluded from consideration when deciding whether possession of ordinary documents is indirectly incrimination, but considered when preventing indirect use of an established constitutional violation? While the incrimination requirement is a largely ignored factor that is unlikely to resolve major issues, it could play an important role in resolving whether the target can be forced to produce items whose location is unknown. The incrimination concept might allow the Court to balance its demonstrated interest in continuing the viability of subpoenas of documents from targets against its newly identified concern that *Fisher's* act of production doctrine may approve results that are unacceptably inquisitorial, particularly for objects that are superficially incriminating. I will set out what I see as the chief competitors for how the incrimination requirement ultimately might be interpreted respecting the act of production doctrine.

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78. See *Marchetti v. United States*, 390 U.S. 39, 53 (1968) ("The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination."); see also *Doe I*, 465 U.S. 605, 614 n.13 (1984) (reiterating that standard). This is a relatively demanding formulation of the degree of threat of incrimination required to trigger protection. Other more expansive descriptions also have been given by the Supreme Court: "The privilege . . . not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . ." *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

79. See *Fisher v. United States*, 425 U.S. 391, 410 (1976) (acknowledging that "act of producing evidence" may have communicative aspects as to existence, possession, and authenticity of that evidence).

80. See *Doe I*, 465 U.S. at 617 n.17 (noting that grant of use immunity need not cover contents of business records because immunity need only protect defendant from *self-incrimination* that might accompany production).

81. See, e.g., *Hoffman*, 341 U.S. at 486 (holding that witness is protected against requirement to give answers "which would furnish a link in the chain of evidence needed to prosecute"). Protection against derivative use exists under the privilege against self-incrimination whether or not immunity is granted. The relationship between consideration of the contents to determine whether possession is incriminating and, if incrimination is found, the prohibition against indirect use of the fruits of a Fifth Amendment violation, including access to the contents of documents gained because of the target's possession of them, is examined, *infra* Part III.E.

The first hypothesis is that the communicative act of production must be incriminating either for possession or existence entirely separate from the incriminating contents of the document. *Fisher* suggested this interpretation<sup>82</sup> and it is supported by a footnote in the later *Doe I* opinion.<sup>83</sup> Its narrowness, however, is difficult to square with the results in *Doe I*<sup>84</sup> and impossible to reconcile with both the opinion and the result in *Hubbell*. This narrow construction of incrimination can no longer be maintained.

The second hypothesis is that, if the prosecution is ignorant of the existence of the document, the contents of the incriminating document may be used to determine whether the incrimination requirement is satisfied because any use of those contents is derived from an indirect use of the prosecution's knowledge of the existence of the document, which was obtained through the act of production.<sup>85</sup> However, incrimination through possession is to be construed more narrowly and involves only possession that itself incriminates separate from consideration of the incriminating content of a document. *Fisher* provides only an indirect theoretical basis for making this proposed distinction between using the incriminating nature of contents to establish indirect incrimination regarding the document's existence, but not regarding possession.<sup>86</sup> This second hypothesis is still viable after *Hubbell*, but it remains in search of a theory.

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82. See *Fisher*, 425 U.S. at 412 (suggesting this interpretation by observation that existence or possession of accountant's papers posed no realistic threat of incrimination without any analysis whether their contents might be incriminating).

83. *Doe I*, 465 U.S. at 617 n.17.

84. The Court affirmed the lower courts' finding that the subpoenas were testimonial and incriminating without any showing that they incriminated separate from considering their contents. *Id.* at 613-14.

85. In *Hubbell*, the court of appeals used derivative analysis to link incriminating contents of documents to the act of production as to existence, terming this indirect incrimination. It stated that "in acknowledging the existence of the Bridgeport Group and its bank account at Pulaski Bank, Hubbell provided a link in the chain of evidence used by the Independent Counsel to substantiate the criminal charges against him – an instance of indirect incrimination." *United States v. Hubbell*, 167 F.3d 553, 582 (D.C. Cir. 1999), *aff'd*, 120 S. Ct. 2037 (2000).

86. See *Mosteller*, *supra* note 6, at 25-27. I argued that *Fisher*'s broadly stated conclusion that production of a document cannot be avoided simply because the document's contents are incriminating is implicitly inconsistent with a determination that possession is incriminating if the document's contents incriminate because the issue of possession could so frequently be in contest. *Id.* Accordingly, proof of possession by the act of production ought to incriminate the defendant more directly. *Id.* By contrast, proof of existence can only incriminate as a result of consideration of the contents, and so incriminating contents must be sufficient to satisfy the incrimination requirement or establishing existence could never violate the Fifth Amendment. *Id.* The *Fisher* opinion, however, fails to note any of these secondary distinctions. See *Fisher*

The third hypothesis is that the incrimination requirement can be satisfied by indirect incrimination that would result through potential prosecutorial use of the contents of the document. It is based on the theory that the use of the document depends upon both the knowledge of the document's existence and the government's access to it, the latter depending upon the target acknowledging possession or access by complying with the subpoena. As to both existence and possession, the principle that indirect use of a Fifth Amendment violation is prohibited<sup>87</sup> supports this hypothesis. I will leave detailed discussion of these issues until Part V.<sup>88</sup>

While the OIC made a weak argument before the court of appeals that Hubbell's production of the documents was not incriminating,<sup>89</sup> it did not pursue that claim in the Supreme Court, leaving the application of that concept to the facts of *Hubbell* almost entirely unexamined. Instead, the OIC argued that producing the documents did not constitute a testimonial communication.<sup>90</sup> That contention was founded on the Supreme Court's "foregone conclusion" doctrine, which applies to the testimonial communication element of production, and, if satisfied, eliminates that element and thereby avoids a Fifth Amendment violation altogether.<sup>91</sup>

#### D. "Foregone Conclusion"

In *Fisher*, the Supreme Court ruled that if existence or possession of documents was a "foregone conclusion" then the act of producing them was not testimonial and the Fifth Amendment did not apply.<sup>92</sup> Despite coining the term and finding the concept satisfied,<sup>93</sup> the Supreme Court has never given

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v. United States, 425 U.S. 391, 412 (1976) (treating possession and existence of papers identically).

87. See *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892) (stating that privilege against self-incrimination protects against both direct and indirect use of witness' testimony).

88. See *infra* Part V.D (analyzing possible implications of Court's concern with inquisitorial implications of use of subpoenas to obtain incriminating evidence from targets, its application in *Hubbell*, and interplay between proof of possession and significance that contents of documents may incriminate).

89. See *Hubbell*, 167 F.3d at 581-82 (noting that OIC had advocated a standard that was too narrow).

90. Brief for Petitioner OIC, *supra* note 42, at 11-32.

91. *Id.* at 32.

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

93. The Court stated cryptically:

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. Under these circumstances by

real definition to that doctrine. I believe the best way to understand the doctrine is that:

when an implicit as opposed to an explicit communication is involved, it is necessary to consider whether the government is really asking a "question" through the subpoena. Granted, the defendant's response to a documentary subpoena always reveals that the item does or does not exist; the government cannot eliminate the implicit question about the document's existence no matter how it phrases the subpoena's demand. But if the government already knows the answer to that question and is truly uninterested in the implicit answer provided by production, the witness' gratuitous communication of it should not violate the fifth amendment.<sup>94</sup>

A prosecutor may wish that she could eliminate the implicit testimonial aspects of production because all she wants are the pre-existing documents without any new communications attached, but the two elements cannot be separated. The prosecutor can, however, prove that the prosecution already knows everything the target will communicate implicitly through the act of production. Doing this establishes that what would have been a testimonial communication is instead a "foregone conclusion" and therefore the Fifth Amendment is inapplicable because one of its requirements is lacking.

What the "foregone conclusion" concept does is to limit the act of production to surrender or delivery of a document rather than communication about it. It is important to note that *Fisher* recognized, and the majority in *Hubbell* accepted, that forcing a target to deliver incriminating evidence through a subpoena is permissible under the Fifth Amendment without any grant of immunity.<sup>95</sup>

Given the above analysis, the term "foregone conclusion" connotes that full awareness of the information provided by the implicit communication is required. The "foregone conclusion doctrine" should not be seen as the equivalent of probable cause because it does more. It is not an alternative means of proof that renders a constitutional violation harmless; rather, it eliminates Fifth

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enforcement of the summons "no constitutional rights are touched. The question is not of testimony but of surrender."

*Id.* (quoting *In re Harris*, 221 U.S. 274, 279 (1911)).

94. Mosteller, *supra* note 6, at 32; *see also* 3 LAFAVE ET AL., *supra* note 11, § 8.13(a), at 257 (adopting analysis described in text).

95. *Fisher*, 425 U.S. at 411. In *Hubbell*, Justice Stevens contrasted the impermissible requirement under the Fifth Amendment of giving the combination to a safe with the permissible result of "being forced to surrender the key to a strongbox." *United States v. Hubbell*, 120 S. Ct. 2037, 2047 (2000); *cf. id.* at 2050-54 (Thomas, J., concurring) (arguing that *Fisher*'s interpretation of Fifth Amendment likely is incorrect and that Court should properly interpret privilege to bar not only compelled testimonial acts but also compelled production of evidence); *infra* Part V.F (describing Justice Thomas's analysis).



Amendment protection by rendering the act of production non-communicative and therefore is properly much more demanding than probable cause.<sup>96</sup>

If my interpretation of the doctrine is correct, its onerous requirements can cause substantial problems to the elimination of the testimonial component when readily mobile objects are subpoenaed. The options are either: (1) to dilute the "foregone conclusion" concept when applied to possession; (2) to place greater emphasis on the significance of the incrimination requirement, construing it to be satisfied as to possession only when relatively directly incriminating items are involved;<sup>97</sup> or (3) largely to eliminate the utility of subpoenas served on targets that demand production of readily mobile documents.

### E. Use Immunity

If a witness has a valid self-incrimination claim, he or she can nevertheless be compelled to testify if granted use immunity.<sup>98</sup> The use immunity doctrine, which receives much of its definition from *Kastigar v. United States*,<sup>99</sup> protects against both direct and indirect use of compelled testimony and any information derived from the compelled evidence.<sup>100</sup> If evidence is compelled

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96. As discussed later in this Article, the actual existence of probable cause to obtain the evidence in some circumstances would establish that any violation of the Fifth Amendment was inconsequential because of the "inevitable discovery" of the same evidence through untainted independent means. See *infra* Part V.C.2 (discussing how, in limited factual situations, prospect of seizure of evidence that would have been valid under Fourth Amendment would provide alternative source for evidence).

97. Imposing such a limitation would resolve the incrimination issue raised earlier in a narrow fashion consistent with *Fisher*. For example, possession of contraband is clearly incriminating because of the facially incriminating nature of the illegal substance. Possession of one's own diary is different, however. Possession of an item of this latter type is not only legal, but also proof of possession typically will not further incriminate the author.

Documents and tangible objects exhibit various levels of incrimination from the facially incriminating quality of contraband to incrimination that results only from a detailed analysis of the contents of facially innocuous documents. A number of these categories are discussed *infra* Part V.D. How revealing possession interacts with the different levels of incrimination along this continuum remains uncertain after *Hubbell*.

98. *Kastigar v. United States*, 406 U.S. 441, 462 (1972) (holding that statutory use immunity is coextensive with Fifth Amendment privilege and, if granted, supplants privilege).

99. 406 U.S. 441 (1972).

100. *Kastigar v. United States*, 406 U.S. 441, 453, 460-62 (1972). In *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892), the Supreme Court struck down a statute that compelled testimony while granting only protection against use of the witness' testimony in any subsequent prosecution. In *Kastigar*, the Court ruled a later statute constitutional that protected against both direct and indirect use, including investigatory leads. *Kastigar*, 406 U.S. at 462. However, only immunity against use of the evidence is required and not immunity from prosecution, commonly known as transactional immunity. *Id.* at 453.

under a grant of immunity and the target is subsequently prosecuted, then the government has the burden of demonstrating that its evidence is untainted.<sup>101</sup> It bears an "affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."<sup>102</sup>

Prosecutors often view as a real challenge the requirement that they prove that they did not violate the guarantees attendant to a grant of use immunity during a subsequent prosecution.<sup>103</sup> Granting immunity carries with it two clear consequences, although it goes no further than the Fifth Amendment requires and constitutes a set of requirements that the prosecution can often readily meet.<sup>104</sup> First, the burden falls on the prosecution to prove that no use was made of the evidence.<sup>105</sup> Second, the no use requirement means that not only direct but also all indirect uses are prohibited.<sup>106</sup>

#### *IV. The Impact of the Hubbell Case on Act of Production Law*

The implications of the *Hubbell* case for act of production law ultimately may be very far-reaching. I begin my analysis by narrowly focusing on what the case clearly decided. I then progressively expand that focus.<sup>107</sup>

Two categorical ("home run") arguments by the government were definitively laid to rest by *Hubbell*. The first was that, for a subpoena directed to a businessman, the government needed only to know that typically businessmen have documents in certain broad classes, such as general business and tax records.<sup>108</sup> The second was that only direct use of the act of production was

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101. *Kastigar*, 406 U.S. at 460-62 (describing consequence to government if target is granted immunity and subsequently prosecuted).

102. *Id.* at 460.

103. See 3 BEALE ET AL., *GRAND JURY LAW AND PRACTICE* § 7.20, at 59-61 (2d ed. 2000) (noting both that courts do not look favorably on prosecution of witnesses who have previously received immunity and inconsistency of approaches used in determining whether evidence is tainted); LAFAVE ET AL., *supra* note 11, § 8.11(b), at 218-25 (describing methods that prosecutors use to comply with *Kastigar* and uncertainties and challenges they face).

104. See 2 BEALE ET AL., *supra* note 103, § 7.20, at 63, 65-66 (indicating factors and methods that typically are successful for prosecution); 3 LAFAVE ET AL., *supra* note 11, § 8.11(b), at 221 (setting out circumstances in which prosecution is most likely to prevail).

105. *Kastigar*, 406 U.S. at 460-62.

106. *Id.* at 453, 460-62.

107. Because of the complexity of the issues, my treatment of the act of production doctrine purposefully involves repetition as the applications become progressively more complicated and the analyses more sophisticated. As new levels of complexity are introduced, I hope repetition will prove useful rather than redundant.

108. See Brief for Petitioner OIC, *supra* note 42, at 32-35 (arguing that "foregone conclusion" established as to basic classes of business documents by target's status as businessman);

forbidden under the Fifth Amendment and a grant of use immunity.<sup>109</sup> Both arguments are no longer viable.

*A. The Category of General Business Documents Does Not Automatically Meet the "Foregone Conclusion" Standard*

The OIC's presentation of the "foregone conclusion" issue was either cavalier<sup>110</sup> or intentionally challenging. It argued that, like every other businessman, Hubbell necessarily had a broad range of business related documents and that the subpoena need only list those broad categories.<sup>111</sup> Given the breadth of the subpoena and the lack of a showing of particularized knowledge,<sup>112</sup> the OIC should have been prepared to grant use immunity without concern for avoiding a finding that production of the documents was testimonial. Or the OIC was deliberately seeking to test the limits of the law and obtain either a beneficial ruling that blunderbuss subpoenas are adequate in all business records scenarios or a damaging ruling that more is always required.

The position that a broad subpoena calling for production of classes of business records falls outside the protection of the Fifth Amendment under the "foregone conclusion" doctrine was rejected theoretically and factually. The

United States v. Hubbell, 120 S. Ct. 2037, 2048 (2000) (rejecting government's contention that deficiency in knowledge is cured as to broad categories of business and tax documents described in subpoena).

109. See Brief for Petitioner OIC, *supra* note 42, at 18-23 (arguing that only direct use of physical act of production is protected by Constitution); *Hubbell*, 120 S. Ct. at 2047 (rejecting government's argument that act of production should be limited to physical act divorced from its implicit testimonial aspects).

110. Indeed, Hubbell's attorney claimed in the Supreme Court that the issue had been waived in the district court, Brief for Respondent Hubbell, *supra* note 37, at 36, but this claim was not accepted by the Court. The court of appeals clearly had reached the merits of the claim based on OIC arguments. *United States v. Hubbell*, 167 F.3d 553, 578-82 (D.C. Cir. 1999), *aff'd*, 120 S. Ct. 2037 (2000). The OIC's effort, however, hardly was vigorous in the trial court. Motions Hearing Transcript, *supra* note 26, at 90, 95 (presenting argument of David Birkhak that OIC could have "gotten a Dun & Bradstreet on" Hubbell and through it obtained bank, credit card, and accountant records but it did not need to take such action before granting immunity, and that OIC could have first contested Hubbell's Fifth Amendment claim based on "foregone conclusion" and lack of incrimination grounds but again it was not required to proceed in that sequence).

111. See Brief for Petitioner OIC, *supra* note 42, at 32-35 (arguing that "foregone conclusion" was established as to basic classes of business documents by target's status as businessman).

112. See *Hubbell*, 120 S. Ct. at 2046 (describing OIC's "fishing expedition"); Motions Hearing Transcript, *supra* note 26, at 5-6 (conceding that although it was not accurate to say that OIC had no idea of what it was going to find, prosecution certainly was not in position to show "with reasonable particularity what the documents contained").

government argued "that the communicative aspect of respondent's act of producing ordinary business records is insufficiently 'testimonial' to support a claim of privilege because the existence and possession of such records by any businessman is a 'foregone conclusion'" under *Fisher*.<sup>113</sup> The Court, however, concluded that the argument misread *Fisher* and ignored *Doe I*.<sup>114</sup> The Court also summarily rejected the fact-based claim that businessmen, such as Hubbell, "will always possess general business and tax records that fall within the broad categories described in [the Hubbell] subpoena."<sup>115</sup> The Court labeled this claim "overbroad," and concluded that the position had been implicitly rejected by its earlier decision in *Doe I*, in which it had upheld the district court's ruling that producing documents under subpoenas demanding "several broad categories of general business records" involved testimonial self-incrimination.<sup>116</sup>

The Court did not decide which test should be used in deciding the "foregone conclusion" question. It chose not to consider whether the "reasonable particularity" test adopted by the District of Columbia Circuit to implement the "foregone conclusion" concept was appropriate.<sup>117</sup> Instead, the Court concluded that resolving the issue was unnecessary because "[w]hatever the scope of this 'foregone conclusion' rationale, the facts of this case plainly fall outside of it."<sup>118</sup>

### *B. Subpoenaed Documents Are Not "Manna from Heaven"*

The second categorical argument that the OIC advanced reflects a long advocated government position.<sup>119</sup> Under that argument, immunity would entail virtually no consequences regarding the derivative use of the contents

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113. *Hubbell*, 120 S. Ct. at 2047 (reciting government's argument in court of appeals and before Supreme Court).

114. *Id.*

115. *Id.* at 2048.

116. *Id.*

117. *United States v. Hubbell*, 167 F.3d 552, 579 (D.C. Cir. 1999), *aff'd*, 120 S. Ct. 2037 (2000).

118. *United States v. Hubbell*, 120 S. Ct. 2037, 2048 (2000); *see also infra* Part V.E (briefly discussing "reasonable particularity" issue).

119. *See* Alito, *supra* note 6, at 59-60, 27 n.\* (arguing in his 1986 article, which was written after leaving Solicitor General's Office but before leaving Justice Department, that contents of documents under Fifth Amendment should be analyzed as if they had magically appeared in grand jury room). In its Petition for Certiorari, the OIC characterized this position as that "advanced by the Department of Justice and by Judge Samuel Alito (writing extra-judicially)." Petition for a Writ of Certiorari at 7, *United States v. Hubbell*, 120 S. Ct. 2037 (2000) [hereinafter Petition for a Writ of Certiorari].

of documents acquired by subpoena and would not prohibit use of the contents of such documents, regardless of whether identity, possession, or existence was previously unknown to the government.<sup>120</sup> *Hubbell* firmly laid to rest that extreme position.<sup>121</sup>

This argument may be stated in several ways. The most colorful statement involves the biblical reference of "manna from heaven" whereby God fed the Children of Israel as they wandered in the wilderness by a form of food – manna – that mysteriously appeared each morning and apparently came from Heaven.<sup>122</sup> The government's position was that a witness granted use immunity would be shielded only "from the use of any information resulting from his subpoena response 'beyond what the prosecutor would receive if the documents appeared in the grand jury room or in his office unsolicited and unmarked, like manna from heaven.'"<sup>123</sup>

The OIC set out the government's position more fully, but less colorfully:

Whatever the Court might conclude about some trivial testimonial communication implicit in respondent's act of producing the documents in this case, it is not plausible to contend that the information contained in those documents – voluntarily recorded by respondent (or others) long before compulsion was brought to bear – somehow is derived from that communication.

We readily agree that the government has the documents – and the information that they contain – because respondent gave them to the government. But the government's possession of the documents is the fruit only of a simple physical act – the act of producing the documents. The contrary view – that the documents are derived from some testimonial communication – rests on the tortured notion that the government obtained the documents not through the physical act of production, but through respondent's implicit testimonial admission that the documents existed, an admission that is irrelevant to any substantive issue.<sup>124</sup>

The Court rejected the government's attempt to limit use immunity to direct uses by the prosecution of the communicative aspects of the act of production

120. See *Hubbell*, 167 F.3d at 602 (Williams, J., dissenting on act of production question) (arguing that court should adopt "manna from heaven" argument, which would place extremely limited constraints on government use of incriminating documents obtained under subpoena).

121. See *Hubbell*, 120 S. Ct. at 2047 (deciding that immunity precluded derivative use of documents because respondent used his knowledge to identify documents).

122. See *Exodus* 16:9-36 (describing appearance of manna).

123. *Hubbell*, 120 S. Ct. at 2041-42 (quoting *United States v. Hubbell*, 167 F.3d 553, 602 (D.C. Cir. 1999), *aff'd*, 120 S. Ct. 2037 (2000) (Williams, J., dissenting)); see also Brief of Amicus Curiae at 25, *Hubbell* (No. 99-166). Samuel Alito, who is now a judge on the Third Circuit, articulated the government's position after he left the Solicitor General's Office, but while he was still at the Justice Department. Alito, *supra* note 6, at 60, 27 n.\*.

124. Brief for Petitioner OIC, *supra* note 42, at 29.

and never to the contents.<sup>125</sup> The Court also rejected the government's "anemic view of respondent's act of production as a mere physical act that is principally non-testimonial in character and can be entirely divorced from its 'implicit' testimonial aspect."<sup>126</sup>

### C. The Essence of the Fifth Amendment Violation

Assessing the extent to which the *Hubbell* opinion will curtail prosecutors' ability to use evidence obtained after granting use immunity against the target largely depends upon discerning what the Court found to be the core of the constitutional violation. That determination turns on what aspect of the act of production violated the Fifth Amendment and on the basic conceptualization of what about that act violated self-incrimination theory.

In discussing what act violated the Fifth Amendment, the Court stated that the requirements that the witness disclose the "existence and location,"<sup>127</sup> "existence or the whereabouts,"<sup>128</sup> and "existence of sources,"<sup>129</sup> and identify "the hundreds of documents"<sup>130</sup> constituted the violation. The Court repeatedly noted that the subpoena required the target to reveal both existence and location.<sup>131</sup> It also found that requiring the identification of documents was improper.<sup>132</sup> However, because the *Hubbell* subpoena used broad categories, "identifying" apparently means finding or selecting the appropriate documents, rather than the more narrow concept of authenticating them as the documents particularly described in the subpoena.<sup>133</sup> Nevertheless, even though additional terms were used, the Court's consistent focus of concern was the subpoena requirement to reveal the existence of unknown documents.<sup>134</sup> The Court

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125. *United States v. Hubbell*, 120 S. Ct. 2037, 2048 (2000).

126. *Id.* at 2047.

127. *Id.* at 2046, 2048.

128. *Id.* at 2048.

129. *Id.* at 2047.

130. *Id.*

131. *Id.* at 2046, 2048.

132. The term "identifying," used in the sense of finding or selecting, is another way to describe providing information of the existence of unknown documents. *Id.* at 2047 (observing that Hubbell was required to "identify the hundreds of documents responsive to the requests in the subpoena" and to provide "an accurate inventory of many sources of potentially incriminating evidence"). When applied to a subpoena that covers broad categories of information, the term prohibits requiring the target to find or select the relevant documents from within a broad category that the prosecution may generally know exists.

133. *Id.*

134. *Id.* (referring to "the existence of sources of potentially incriminating evidence" in its summary statement).

stated, "[i]n sum, we have no doubt that the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the *existence* of sources of potentially incriminating evidence."<sup>135</sup>

On the other hand, although the Court's emphasis was on establishing the existence of previously unknown documents, it did not say that a constitutional violation occurred only because the subpoena required that revelation. Indeed, the opinion may suggest that the prosecution's lack of knowledge of possession would have produced the same result.<sup>136</sup> However, the Court did not clearly state this result, let alone specify the circumstances under which it would be warranted.

The Court also spoke in broadly applicable terminology, identifying the Fifth Amendment values offended by the subpoena at a more conceptual level. It stated that "[i]t was unquestionably necessary for respondent to make extensive use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the requests in the subpoena."<sup>137</sup> Further, "[i]t was only through respondent's truthful reply to the subpoena that the Government received the incriminating documents of which it made 'substantial use . . . in the investigation that lead to the indictment.'<sup>138</sup>

While it could be read more broadly, the first statement is consistent with a focus on the prosecution's learning of the existence of documents through the target's efforts to find and select them from a broadly defined group of general business documents that most individuals in Hubbell's position would possess.<sup>139</sup> However, if as the second statement indicates, a documentary subpoena violates the Constitution any time a truthful response by the target allows the government to receive incriminating documents, the scope of pro-

135. *Id.* (emphasis added).

136. *Id.* at 2048 (concluding that act of production had testimonial aspects "at least with respect to the existence and location of the documents").

137. *Id.* at 2047.

138. *Id.* (quoting Brief for Petitioner OIC, *supra* note 42).

139. If the statement is intended to convey the more narrow sense of identifying documents, as in "authenticating" them, the consequences are not great in the typical situation. Act of production immunity as to authenticity is relatively easy to circumvent in many situations by independent proof of authenticity. Mosteller, *supra* note 6, at 40-43. Indeed, the communicative aspect of authentication can be eliminated by a very specific demand in the subpoena that renders the response nontestimonial, and therefore does not require immunity. *Id.* at 14-15. In a case such as *Hubbell*, with the broad categories in the subpoena and the lack of government knowledge of the existence of documents, either eliminating the testimonial aspect of identifying documents in the narrow authentication sense or establishing an independent source once immunity is granted would not be easy. However, the difficulties in authentication should be seen as an indirect consequence of the government's total lack of knowledge of existence of the documents, rather than as constituting a significant independent barrier to constitutional production and use of the documents.

tection is much broader. The second formulation also appears to treat revealing location as a Fifth Amendment violation and seems to require that use immunity be granted, rendering any use of the documents' contents unconstitutional. While the Court must resolve other issues before the full Fifth Amendment consequences are felt, treating the disclosure of location the same as revealing existence may significantly expand the impact of Fifth Amendment protection and restrict the effective reach of subpoenas directed at potential prosecution targets.

#### *D. The Use of Contents of Unknown Documents Violates Use Immunity*

I will examine some of the implications of how much farther these statements and the Court's analysis may carry the protections of the privilege below. However, while the theory may not be entirely clear, one result is: If, after the application of the "foregone conclusion" test, the existence of documents is testimonial, the use of the contents of the documents obtained under use immunity violates the Fifth Amendment. After *Hubbell*, use of the contents of the documents is not independent of the act of production if the government did not previously know of the existence of those documents.<sup>140</sup> Thus, the prohibition against the derivative use of documents means that the prosecution cannot use their contents when it cannot clearly show its prior knowledge that the documents existed.

#### *E. The Practical Death of Use Immunity for Unknown Documents*

As should have been obvious to the OIC, *Hubbell's* Fifth Amendment assertion in response to the subpoena for documents clearly was plausible. Any prosecutor in this situation has three principal options that would either eliminate the Fifth Amendment barrier or overcome it. First, the prosecution can argue that production is not testimonial. Second, it can contend that production is not incriminating. Third, assuming the requisites of the Fifth Amendment are found to be present, it can grant use immunity to the target for the act of production. The first two responses eliminate the Fifth Amendment claim and, therefore, provide the documents to the prosecutor without limiting or eliminating their usefulness in prosecuting the individual. The final response, immunity, permits the prosecutor to receive the documents, but does so with substantial or total limitation on the use of the documents against the target. As noted earlier, the OIC immediately chose the third option and

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140. As noted earlier, the Court also found the act of identifying the documents improper. See *supra* notes 127-30 and accompanying text. I believe this is equivalent to disclosing otherwise unknown existence where selection of the relevant items is required from a much broader category that the government knew existed only in general categories. Such knowledge of the class did not establish existence of a subset of relevant documents.



promptly secured the documents coupled with the likely consequences of granting use immunity.<sup>141</sup>

Whatever its broader import may prove to be, the clear legacy of *Hubbell* is the death of use immunity as a tool in cases involving targets of subpoenas for documents where the existence of the documents is not known. Now the important battle is the determination of the extent of prosecutorial knowledge necessary to establish that the existence of the documents is a "foregone conclusion." In that context, *Hubbell* eliminated the most useful prosecutorial argument. The Court rejected, apparently categorically, broad subpoenas covering classes of business records under a general claim that all businessmen possess them.<sup>142</sup> The Court indicated that the problem was more than just the particular set of overbroad categories used in *Hubbell*, stating that an effort to use broad categories had also been rejected in *Doe I*.<sup>143</sup> The Court said that the use of broad categories constitutes a generally unacceptable approach and the prosecution must show "prior knowledge" of existence.<sup>144</sup>

The granting of use immunity also might create a trap for the government. If the subpoena potentially calls for an item of evidence of which the government is unaware, a target may be tempted to provide it, knowing that the government will then bear a heavy burden of showing that the contents of the documents were not used in any fashion to convict him.<sup>145</sup> Absent very careful treatment of the documents by the prosecution, such information may make its way into the fabric of the evidence and, absent a clear independent source for all the contents, prove devastating for successful prosecution of the subpoena's recipient for conduct covered by the documents.<sup>146</sup> The danger inherent in granting use immunity to targets is now great; indeed, in most cases use immunity generally will be inconsistent with prosecuting the target on charges that relate to the documents produced.<sup>147</sup> Instead, the only viable

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141. See Bates & Starr Letter, *supra* note 28, at 56 (stating willingness of OIC to grant formal or informal immunity).

142. *United States v. Hubbell*, 120 S. Ct. 2037, 2048 (2000).

143. *Id.*

144. *Id.*

145. The requirements will be onerous, particularly if courts follow the analysis of *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990) (opinion on rehearing). In that case, the District of Columbia Circuit ruled that both prosecutors and witnesses must be shielded from exposure to immunized testimony and emphasized that proof must be shown to be independent of evidence indirectly derived from immunized testimony. *Id.* at 947.

146. *Id.*

147. Because documents contain written communications that are already fixed and fully defined, an independent source for those same documents could eliminate the harm resulting from a Fifth Amendment violation. By contrast, in *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), the testimony of live witnesses was at issue and was affected by exposure to tainted testimony. In order to show lack of taint, the court of appeals required that the testimony have been fixed or "canned" in advance of the illegality. *Id.* at 872. When documents are involved

avenue for the prosecution is to establish that proof of existence is not testimonial because the fact of existence is a "foregone conclusion."

### V. The Implications of *Hubbell*

#### A. The Narrowing Reconstruction of *Fisher*

The *Hubbell* Court gave no indication that it was overruling any aspect of *Fisher*. However, *Fisher* regarded the self-incrimination threat in document production as quite limited and in light of *Hubbell*'s rather broad construction of the Fifth Amendment protections threatened by document production, *Hubbell* should be interpreted as reformulating *Fisher*.

*Fisher*'s atypical facts provide the basis for this reinterpretation of the Fifth Amendment protections. Indeed, one of the interesting aspects of *Hubbell* is its characterization of the subpoenas and the state of the government's knowledge in *Fisher*. The *Hubbell* Court made two relevant observations. First, "*Fisher* involved summonses seeking production of working papers prepared by the taxpayers' accountants that the IRS knew were in the possession of the taxpayers' attorneys."<sup>148</sup> In making its second observation, the Court stated:

While in *Fisher* the Government already knew that the documents were in the attorneys' possession and could independently confirm their existence and authenticity through the accountants who created them, 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.<sup>149</sup>

The records in *Fisher* were documents given to the taxpayer defendants and then transferred by the defendants to their lawyers.<sup>150</sup> The government had independent knowledge of the existence and location of the papers,<sup>151</sup> and the individuals who prepared documents could authenticate them.<sup>152</sup> Regarding existence, the government had clear knowledge of a group of transferred documents.<sup>153</sup> The defendants were not required to select the papers from a larger category of their records. The documents sought were those that the

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and alternative sources for the same documents are shown, producing an untainted "canned" version of the evidence is virtually automatic.

148. *United States v. Hubbell*, 120 S. Ct. 2037, 2047 (2000).

149. *Id.* at 2048.

150. *Fisher v. United States*, 425 U.S. 391, 394 (1976).

151. Indeed, Justice Brennan's concurring opinion stated that the taxpayers stipulated that the documents existed and were those described in the subpoena. *Id.* at 430 n.9 (Brennan, J., concurring).

152. See 2 MCCORMICK ON EVIDENCE § 219 (5th ed. 1999) (describing simplest form of authentication, which includes testimony of person preparing records).

153. *Fisher*, 425 U.S. at 430 n.9 (Brennan, J., concurring).

accountants shipped to the defendants who then transferred them to their attorneys.<sup>154</sup> The government knew the current location and could therefore establish possession. The government's very complete knowledge in this factually atypical case eliminated *any* real communication by response to the subpoena. Thus, under *Fisher's* fact pattern, the Court could state accurately that "[t]he question is not of testimony but of surrender."<sup>155</sup>

*Fisher* now necessarily stands for a relatively narrow point in obtaining documents from individuals by subpoena without violating the Fifth Amendment. Rather, it should now be seen as a companion to, and minor extension of, the significant decisions rejecting Fourth Amendment limitations on obtaining documents, espoused in *Boyd*.<sup>156</sup> *Fisher* stands for the proposition that requiring the production of incriminating documents from a target does not violate the Fifth Amendment if the government clearly establishes the existence and location and if the production requires no selection by the target.

Even after *Hubbell's* reformulation, *Fisher's* holding is by no means trivial. A grand jury subpoena may force targets to surrender incriminating evidence under compulsion, as long as new incriminating testimonial acts are not required.<sup>157</sup> Moreover, even when the prosecution cannot obtain a search warrant because it lacks probable cause regarding the incriminating quality or relevance of the items sought, the prosecutor can obtain the evidence from a target through a subpoena because a grand jury subpoena does not require probable cause.<sup>158</sup> Despite the position of Justice Thomas, joined by Justice Scalia, that the Fifth Amendment should be understood to protect against compelled production of evidence as well as testimony, at least this limited reading of *Fisher* remains intact.<sup>159</sup>

154. *Id.* at 394.

155. *Id.* at 411 (quoting *In re Harris*, 221 U.S. 274, 279 (1911)).

156. *See Boyd v. United States*, 116 U.S. 616, 634-35 (1886) (concluding that compulsory production of private books can be unreasonable search and seizure within meaning of Fifth Amendment); *see also supra* note 73 and accompanying text (discussing *Boyd*).

157. *See Schmerber v. California*, 384 U.S. 757, 767 (1966) (deciding that taking blood sample from suspect did not involve communicative act and therefore did not violate Fifth Amendment).

158. In this situation, probable cause would exist as to location, but not as to the import of the evidence sought. *See United States v. R. Enters., Inc.*, 498 U.S. 292, 297-301 (1991) (ruling that grand jury subpoena need not be justified on basis of probable cause and that, regarding challenge based on relevancy grounds, "the motion to quash must be denied unless the district court determines that 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").

159. *See United States v. Hubbell*, 120 S. Ct. 2037, 2050-54 (2000) (Thomas, J., concurring) (expressing view, based largely on reexamination of historical sources, that self-incrimina-

Other aspects of the act of production doctrine remain undisturbed and leave the doctrine as an important source of evidence for the prosecution. When prosecutors issue subpoenas directed to corporations and other artificial entities to which the Fifth Amendment provides no protection,<sup>160</sup> the Court has ruled that custodians can be compelled to provide documents without regard to the potential of those documents to incriminate the custodians personally.<sup>161</sup> Furthermore, both artificial entities and individuals must provide "required records," regardless of their incriminating qualities.<sup>162</sup>

Although the Court limited the doctrine's reach for individuals, the precise nature of the changes remain uncertain. We know the result at the two ends of the spectrum, with *Fisher* occupying one extreme (all relevant facts known by the government) and *Hubbell* the other (neither existence nor possession known). In *Hubbell*, the prosecution did not show that it knew that the documents existed, nor could it show that it knew that the target had possession of the documents, let alone that they had been there at the time the subpoena was served. Cases in the vast factual gulf between *Fisher* and *Hubbell* are now without clear resolution. However, if the apparent implications of *Hubbell*'s language are followed, much greater protection will be afforded to potential prosecution targets with respect to production of documents and other tangible items than previously assumed.

### *B. A Broadening Emphasis in Theory of Fifth Amendment Violation*

Although earlier decisions had acknowledged that the required production of documents involved use of the target's mind or truth-telling,<sup>163</sup> *Hubbell* put greater emphasis on this element than the other act of production opinions.

tion clause of Fifth Amendment was intended to cover compelled production of evidence as well as testimony). See generally *infra* Part V.F (discussing Justice Thomas's analysis).

160. See *Bellis v. United States*, 417 U.S. 85, 88 (1974) (ruling that artificial entities, such as corporations, do not have Fifth Amendment privilege).

161. See *Braswell v. United States*, 487 U.S. 99, 103-104 (1988) (reaffirming that long-standing collective entities doctrine remained valid and unaffected by new analyses of document production in *Fisher* and *Doe I*). The *Braswell* Court, however, warned the government about the problematic impact of granting use immunity to a custodian of such records if it anticipated prosecuting the custodian. *Id.* at 117.

162. See, e.g., *Dep't of Soc. Serv. v. Bouknight*, 493 U.S. 549, 555-56 (1990) (assuming production of child was testimonial and incriminating, requirement of production of child still did not violate Fifth Amendment because mother assumed custodial duties under judicial supervision and therefore production was required as part of a noncriminal regulatory regime not governed by Fifth Amendment constraints); *Shapiro v. United States*, 335 U.S. 1, 17-18 (1948) (discussing inapplicability of Fifth Amendment to required records kept for public benefit and public inspection).

163. See *Fisher v. United States*, 425 U.S. 391, 411 (1976) (arguing that "[s]urely the Government is in no way relying on 'truth-telling' of the taxpayer").

The *Hubbell* Court noted that "[i]t was only through respondent's truthful reply to the subpoena that the government received the incriminating documents"<sup>164</sup> and "[i]t was unquestionably necessary for respondent to make extensive use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the requests in the subpoena."<sup>165</sup> By basing the decision on this theoretical Fifth Amendment rhetoric, the Court appeared to be saying that document production is to be part of, rather than separate from, the established Fifth Amendment protections. Further, the Court appeared to be effectively signaling an end to what practitioners and lawyers previously could have viewed as a somewhat separate doctrinal treatment of subpoenas that favored the prosecution.<sup>166</sup>

As noted above, the unmistakable result of *Hubbell* is that, when the government does not have knowledge of sources of incriminating information, thus requiring the target to respond truthfully to a request to identify those sources and to make use of his or her mind, the prosecution's use of the contents is a prohibited derivative use and a Fifth Amendment violation. An intriguing question left unanswered by the opinion is whether this broad scope of the privilege also prohibits use of contents beyond the situation where the very existence of the documents is unknown.

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164. *United States v. Hubbell*, 120 S. Ct. 2037, 2047 (2000). On the importance of the link between requiring truthtelling and finding a violation of the Fifth Amendment, the Court relied on 8 JOHN HENRY WIGMORE, JR., *EVIDENCE* § 2264, at 379 (John T. McNaughton rev. 1961); Alito, *supra* note 6, at 47; and Stuntz, *supra* note 6, at 1228-29, 1256-59 (stating that it is accepted universally that production of items in response to subpoena "*relying on* [the individual's] *moral responsibility for truthtelling*" may be resisted under Fifth Amendment).

165. *Hubbell*, 120 S. Ct. at 2047.

166. I argued earlier in this Article that the reckless and ill-advised litigation strategy of the OIC helped produce the limitations on prosecutorial use of document subpoenas. *See supra* notes 57-68 and accompanying text (arguing that lack of institutional constraints likely helped cause OIC to use extreme tactics and arguments that proved unacceptable inquisitorial to the Court). Although the personal impact of John Nields, *Hubbell*'s attorney, may have been less dramatic, his decision to couch his argument in this more protective rhetoric also undoubtedly played an important role. Near the end of the argument the questioner was seeking guidance from Nields on how to fashion a workable test for the "foregone conclusion" concept. Instead of answering the specific question, he suggested a simpler and broader way to resolve the case:

But what I would suggest here is that – that this isn't the case to law down the exact standard, only to say that the analysis has to be are you relying on the witness' truth-telling to get the document. And if you are, it's testimony and the Fifth Amendment applies. And if you only got an incriminating document because the witness told the truth and you got it under immunity, you [must] hold the witness harmless.

*United States Supreme Court Transcript at 50, United States v. Hubbell*, 120 S. Ct. 2037 (2000) (No. 99-166) [hereinafter *Supreme Court Transcript*]. In its most critical aspect, the *Hubbell* opinion reflects Nields's suggestion.

1. *The Perceived Threat of Approving the Hubbell Subpoena and the Courts' Troubling Hypotheticals*

If *Hubbell* results in a substantial re-interpretation of the previously understood meaning of *Fisher* and broadly limits prosecutorial use of contents after a grant of immunity, then the Supreme Court's selection of Fifth Amendment rhetoric such as the "respondent's truthful reply" and the "contents of his own mind" will play a critical role.<sup>167</sup> The OIC's reckless litigation strategy likely played a role in the Court's selection of that broad rhetoric. It gave the Court a fact pattern that threatened core Fifth Amendment sensibilities and brought other intolerable inquisitorial images to mind. Without particular knowledge of any crime, the OIC had subpoenaed from Hubbell virtually all of his business related documents under a grant of use immunity. The OIC sorted through those documents, discovered a crime, and then prosecuted Hubbell based on evidence it obtained from the documents secured through a grant of immunity. Moreover, the arguments offered by the OIC to defend these practices did nothing to eliminate the potential of prosecutors using these same techniques against others in the future.

Government lawyers, both from the OIC and the Department of Justice, could not have been comforted by the hypothetical fact patterns that came from the bench during the *Hubbell* litigation. The hypotheticals were revealing about the Justices' views and the troubling implications of these views. The hypotheticals used weapons instead of documents because they are superficially incriminating and thereby highlight the visceral element of the inquisitorial challenge to Fifth Amendment protections. Beyond signaling the Court's concern with the government's fundamental position, the hypotheticals may also preview situations in which courts likely would find a Fifth Amendment violation. Specifically, they suggest that requiring a target to disclose the location of an object may violate the privilege against self-incrimination. Questions regarding location could arise frequently, and if immunity were required, any use of the items secured by the prosecution might be barred, including the results of tests performed on them.

*Hypothetical 1A.* If the government has no idea whether the target has ever owned or possessed a gun, can it serve the target with a subpoena requiring production of all guns in his or her possession, provide use immunity, and then use the gun or guns obtained in any way at trial?<sup>168</sup>

*Hypothetical 1B.* Assume everyone knows that the target has a number of guns in his house.<sup>169</sup> Without granting immunity, can the prosecutor, who

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167. *Hubbell*, 120 S. Ct. at 2047.

168. Supreme Court Transcript, *supra* note 166, at 14.

169. *Id.* at 7, 14. In the District Court argument, this hypothetical involved shoes rather than guns and made reference to the prosecutor's effort in the O.J. Simpson case to prove that Simpson

is interested in a particular gun used in a specific crime, demand through a subpoena that the target produce all guns that are in his house because the target's possession of some guns is a well known fact and therefore arguably a "foregone conclusion"?

The first hypothetical models a rough version of the *Hubbell* case itself. The government's "manna from heaven" response applies to this situation and would allow it to use any ballistics or other scientific evidence derived from testing the gun (equivalent to contents) to prosecute the target.

The second hypothetical poses the problem of items identified only by general classification instead of by individual item within that classification. The target is known to possess guns (equivalent to business records), but it is a particular gun of yet unidentified characteristics that the prosecution seeks by the subpoena. The existence of "each and every" or "all" guns is not a "foregone conclusion." This subpoena requires the target to identify, assemble, and select the items from a generally described class. The prosecution narrowed the selection process somewhat since a relatively specific category, guns, is identified. However, the prosecution does not know of the existence of any particular gun. This hypothetical reveals several of the issues that should be resolved by the "reasonable particularity" test or other formulation designed to determine whether the communicated information is a "foregone conclusion."

*Hypothetical 1C.* Instead of either of the above descriptions, the subpoena requires delivery of a precisely described .38 caliber Smith & Wesson revolver with ivory handles and a "K" carved into one of those handles.<sup>170</sup>

The specific description of the gun in the subpoena would both solve the problem of selection and eliminate the issue of existence if a prosecution witness knows that the target had such a weapon. A highly particular description eliminates the problem of the target being required to assemble the items from a generically defined class. The communication eliminated by this highly particular description suggests that the government must not only describe the class, but it must also know specifically that the particular item or items in that class exist. I suggest that in addition to a subpoena containing a precise description of the item to be delivered (such as the revolver with a "K" carved in its handle), a subpoena should be sufficient if it clearly identifies the "container" in which the items are located, such as all canceled checks received in an envelope from Bank of America postmarked in August 2000.

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owned a specific brand of shoes (Bruno Magli), whose soles produced the bloody footprints at the scene of the double murder. C.W. Griffin, *Dubious Experts*, WASH. POST, Jan. 11, 1999, at A.19. The court considered whether a subpoena that required Simpson either to turn over all his shoes or the full contents of his closet would have been lawful. Motions Hearing Transcript, *supra* note 26, at 81-82 (presenting argument of John Nields and colloquy with court).

170. Supreme Court Transcript, *supra* note 166, at 14.

If the prosecutor specifically designated a container of items and established its existence as a "foregone conclusion," several issues have been eliminated. However, other issues remain. The prosecutor has not shown the continued existence and the target's present possession of any or all members of the items in that container, such as particular canceled checks. If this is required, it may prove highly problematic to the prosecution.

*Hypothetical 2.* In a murder case, the prosecution has recovered the bullet that caused death, and it also knows that the defendant bought a gun of the same caliber because he purchased it in a state where all handguns are registered upon purchase. A subpoena demanding production of the gun is served on the defendant. Once the prosecution has control of the gun, it will perform forensic tests under the assumption that a bullet from that gun can be matched with the relatively intact and unmarred slug taken from the victim's body.<sup>171</sup>

This hypothetical begins to raise questions about the temporal components of knowledge of existence and location, and about the significance of lack of current knowledge regarding them. It also introduces questions of what legal use may be made of a detailed examination of the contents of the item produced, which might be considered an indirect use of the act of production. Is the existence of the gun a "foregone conclusion" because of the unchallengeable, but dated, registration information? If no one has seen the gun in the past few months so that the target may continue to possess it or may have hidden or destroyed it, is possession a "foregone conclusion" so that production is not testimonially communicative? If possession remains testimonial, use immunity is granted, and the prosecutor does not offer any evidence regarding recovery of the gun from the target's possession at trial, may the test results (contents) and the already known information that the target once owned this gun be introduced?<sup>172</sup>

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171. The Supreme Court asked a form of this hypothetical question during oral argument. *See id.* at 8. The question also included the fact that the gun had been hidden. *Id.* at 9. The hypothetical may have had its origins in comments by the OIC lawyer during the district court argument on Hubbell's motion to dismiss the indictment. The OIC attorney described a civil rights prosecution in federal district court in Maryland, which ended in a guilty plea and without a published opinion. Motions Hearing Transcript, *supra* note 26, at 98. In that case, the OIC asked a police officer to surrender all guns he was carrying on the night of the shooting, and the prosecutor had the serial numbers of those guns. *Id.* Upon production of a gun, tests were conducted, and the gun was linked to the shooting. *Id.* OIC counsel claimed, but provided no documentation, that this type of immunity was used frequently in courtrooms all across the country. *Id.*

172. Although not responding to precisely this hypothetical, the OIC's argument with respect to forcing the target to produce the gun was that the court could force the target to produce the weapon, but could not force him to state in actual testimony where the gun is located. Supreme Court Transcript, *supra* note 166, at 10-11. Again not referring to this particular gun



*Hypothetical 3.* The suspected murderer showed a distinctive and easily describable gun (a .38 caliber revolver with the letter "K" carved on one of its ivory handles) to a witness and then fled to a cabin in some nearby woods where he was surrounded and captured. The prosecution thus knows that the gun still exists and that it must be somewhere in the cabin or in the adjacent woods, but the prosecution has been unable to find it.<sup>173</sup> Because the gun's existence is a "foregone conclusion" as is possession during the chase, can the target be required by subpoena to produce the gun without a grant of immunity?

Hypothetical 3 highlights an intuitive concern that revealing location, when that fact is unknown to the prosecution, constitutes important incriminating information. It also demonstrates how easily such a question can arise. Even if revealing location is considered testimonial under these circumstances, the government may still have alternative ways to prove its case. Because only possession is testimonial, would granting use immunity result in the exclusion of only evidence of possession? Or, would granting use immunity also result in the exclusion of evidence regarding the gun's serial numbers and scientific tests conducted on it (the equivalent of contents) that might help prove that the defendant purchased the weapon and used it to commit the murder?

*Hypothetical 4.* A murder suspect is granted immunity and compelled to incriminate himself verbally. Under compulsion, he is asked to reveal the whereabouts of the murder weapon. The prosecution concedes that it would not have discovered the weapon where the suspect buried it. As a result of his information, police recover the knife, and scientific tests reveal the defendant's fingerprints and the victim's blood on the knife.

The District of Columbia Court of Appeals used a similar hypothetical in its opinion. The court thought that oral testimony and the evidence derived from it – such as the weapon and all evidence from its examination – could not be used against the defendant. It found no basis for distinguishing between verbal statements and implicit testimony given by acts or verbal statements,<sup>174</sup> and therefore would attribute the same consequences to compelled

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hypothetical but to a similar one, counsel for the Department of Justice believed that a court could compel the production of a weapon. However, the counsel expressed some concern in such a situation about meeting the requirement that the government prove that in developing the evidence no investigative leads or focus on the target resulting from the disclosure were used. *Id.* at 22-23.

173. *Id.* at 48 (presenting question asked to Nields). Perhaps the initial elements of what became this hypothetical ("He's hidden the gun somewhere.") were posed first to the OIC's lawyer. *Id.* at 9.

174. *United States v. Hubbell*, 167 F.3d 552, 584 (D.C. Cir. 1999), *aff'd*, 120 S. Ct. 2037 (2000). The court of appeals cited and quoted from *Doe v. United States*, 487 U.S. 201 (1988)

production of the weapon by subpoena.<sup>175</sup> Notably, possession or location is the only testimonial act involved in this hypothetical, which strongly suggests that the court of appeals believed that revealing location through an act of production would be sufficient to warrant suppression of the "contents" of the object.

*Hypothetical 5.* A murder victim's body is found in the basement of a large apartment building, and an autopsy establishes stabbing as the cause of death. The prosecution serves a subpoena on every resident of the building requiring them to produce all knives and other forms of cutlery that are now, or in the preceding month have been, in their possession or control.<sup>176</sup> An objection is made on Fifth Amendment grounds, and use immunity is granted. The residents of the building produced a quantity of knives. Upon testing, the victim's blood and a resident's fingerprint are on one knife.<sup>177</sup>

This hypothetical presents a case where the government lacks knowledge of the existence of individual items within a broad category, while not raising the question of whether the court should impose rigid requirements of immediate knowledge of existence and location. Like some of the earlier hypotheticals and the *Hubbell* facts, I believe the courts clearly should resolve the legal issues against the prosecution because the hypothetical offends anti-inquisitorial values. As a result, the court would exclude evidence obtained from the examination of the unknown knives as inconsistent with the privilege against self-incrimination and use immunity.

To this point, the incrimination issue has been ignored. Possession of the item in this hypothetical, a weapon, would be incriminating even under the narrow analysis used by *Fisher*. This would not be true for many documents.

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[hereinafter *Doe III*] in making this argument. In *Doe II*, the Court stated "These principles [regarding testimonial self-incrimination] were articulated in general terms, not as confined acts. Petitioner has articulated no cogent argument as to why the 'testimonial' requirement should have one meaning in the context of acts, and another meaning in the context of statements."

*Id.* at 210 n.8.

As noted *supra* note 172, the OIC nevertheless contended during oral argument in the Supreme Court that, while it could compel production of items whose location was not known, it could not require the target to disclose the unknown location through actual testimony. The argument that the Court could draw either a sharp distinction or some difference in treatment between compelling explicit speech and indirect communication through the act of production under the Fifth Amendment, was apparently rejected by *Doe II*, but, in fairness, the Court has not carefully examined the possible distinction. See also *infra* note 179 and accompanying text (opposing drawing of distinction between acts and verbal statements for purpose of determining incrimination).

175. *United States v. Hubbell*, 167 F.3d 552, 584 (D.C. Cir. 1999), *aff'd*, 120 S. Ct. 2037 (2000).

176. *Id.*

177. *Id.*

*Hypothetical 6.* A murder suspect is known by his spouse to keep a diary in a specifically described green notebook with unique writing on the front. The suspect possessed the diary in his home within an hour (or a day or a week) of the time he was served with a subpoena describing the diary in precise detail and demanding its production.<sup>178</sup> Does the production of the diary constitute testimonial incrimination?

Hypothetical 6 moves us out of the realm of superficially incriminating weapons, but the precise description used and the prosecution's clear knowledge of existence eliminates a number of frequently encountered problems. Under these facts, are existence and possession a "foregone conclusion," so that production of the diary would entail testimonial communication and therefore require a grant of immunity? Even if possession is not a "foregone conclusion," is the Fifth Amendment nevertheless inapplicable because possession of a person's own diary is not incriminating without reference to its content? Assume that use immunity is granted only because possession is the communicative element. Can the contents of the diary, which reveal a motive for the murder, be introduced after use immunity has been granted if nothing about the target's possession of the diary is shown at trial?

The above hypotheticals raise a range of problems regarding subpoenas for incriminating evidence. I believe that an analysis of these hypotheticals under reasonably clear principles reveals a number of significant conclusions and highlight some remaining, unresolved issues. I will summarize these.

1. The facts of *Fisher* do not raise the problems discussed above, because existence and possession were "foregone conclusions" under any reasonable definition, and no selection within a generally defined class was required.

2. The hypotheticals highlight the extreme nature of the government's "manna from heaven" argument. In all but Hypothetical 4, that argument allows the court to order production under a grant of immunity while allowing the prosecution to use the "contents."

3. Hypothetical 1B illustrates one of the reasons for a "reasonable particularity" requirement. Such a requirement would prevent the government from using a generic category to establish a "foregone conclusion" when it knows that the target has some items in the class, but does not know of the existence (or *a fortiori* possession) of the particular item of interest.

4. Hypothetical 4 suggests that there should be no distinction between requiring production of an item and asking the target under compulsion to

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178. This hypothetical question differs from the others in that it was not used in any of the arguments in the *Hubbell* case, but is instead of my formulation. See Mosteller, *supra* note 6, at 13 (arguing that when subpoena describes item to be produced with such particularity that uninformed third party could satisfy its demand, compliance is non-testimonial).

state whether the item exists and where it is located. Language from *Doe II*<sup>179</sup> certainly suggests that the court of appeals was correct in concluding that no distinction should be drawn. Because the Supreme Court has never extensively examined the issue, some possibility remains that it may develop an important difference in treatment between compulsion of testimony per se and compulsion of implicit testimony through production. However, any such distinction would be very difficult to justify under established Fifth Amendment doctrine. If, in the end, requiring a target to disclose location through production is as fully protected as requiring such a revelation through oral testimony, the implications are substantial.

5. Examination of the hypotheticals as a group suggests that, as to easily moved or hidden items, existence is easier to establish as a "foregone conclusion" than is possession, and as to readily destructible items, knowledge of existence at one point does not guarantee its continued existence. Either the definition of a "foregone conclusion" must be variable and require less exactitude when possession is at issue, or eliminating the testimonial element in showing the target's possession will prove difficult. If not, another limiting mechanism, such as a rule governing when possession can incriminate, must be developed if subpoenas are to remain a viable tool for production of readily mobile items from targets.

6. If "respondent's truthful response" and "contents of his own mind" are the touchstones of a Fifth Amendment violation, then possession as to easily disposable or concealed items, such as individual papers, may be difficult to establish as a "foregone conclusion." Such items could not be obtained through a subpoena consistent with the Fifth Amendment unless the prosecution grants immunity, limiting the direct and indirect use of the item.

7. If possession is frequently found to be testimonial, then pressure may be placed on the interpretation of the incrimination requirement because, for many documents, a finding that possession is not incriminating could be the only generally available way to avoid the protections of the Fifth Amendment and the potentially heavy burdens of use immunity.

8. By indicating that the incriminating nature of their contents does not count in determining whether possession of documents is incrimination,<sup>180</sup> *Fisher* suggests the incrimination component of the doctrine should be narrowly applied to most documents.<sup>181</sup> By contrast, items such as contraband

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179. See *Doe II*, 487 U.S. at 210 n.8 (stating that "Petitioner has articulated no cogent argument as to why the 'testimonial' requirement should have one meaning in the context of acts and another meaning in the context of verbal statements").

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

181. In its opinion, the court of appeals construed the incriminating effect of possession of business documents quite broadly. It suggested that possession of an interest bearing checking

and weapons satisfy the incrimination without a detailed examination of their "contents" because possession is itself illegal or often highly incriminating. *Fisher's* perspective provides a possible basis for different treatment of possession of documents (relatively indirect incrimination) and guns (relatively direct incrimination) that arises though the act of producing these items. Whether such a distinction should or does survive *Hubbell* is unclear.

9. If the incrimination component is satisfied, then production would appear to require a grant of use immunity if the item's whereabouts are unknown to the prosecution. In that situation, use of the item's contents would appear to be derivative of a constitutional violation and therefore prohibited. A court motivated to avoid exclusion of the evidence must develop a theory to distinguish establishing existence from proving possession (or whereabouts) with respect to the prohibition against derivative use. This distinction may prove difficult to make.

10. The fact that failure to produce items known to exist and to recently have been in the individual's possession will result in an inference of guilt serves as a practical limitation on both the usefulness of Fifth Amendment protection to the target and its cost to the prosecution. The failure of the target to account for an obviously suspicious item shown to have been recently in her possession will have an incriminating effect without any explicit refusal to produce or an admission by the target that the item is no longer available. By contrast, the absence of items that are superficially innocuous or not in fact known to exist will not normally have an incriminating effect, because no explanation regarding the item would be logically expected.<sup>182</sup> Nevertheless, the prosecution cannot constitutionally compel the target to state specifically that he or she no longer possesses an item,<sup>183</sup> nor can it use the compelled answer regarding such destruction when use immunity has been granted.

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account would be incriminating by helping to eliminate a defense of lack of knowledge. *Hubbell*, 167 F.3d at 582. Such an interpretation appears to be at odds with the Supreme Court's analysis of the incrimination issue in *Fisher*. *Fisher*, 425 U.S. at 412. See generally *infra* Part V.D.

182. Cf. 2 MCCORMICK ON EVIDENCE § 264 (5th ed. 1999) (discussing missing evidence inference).

183. The "Definitions and Instructions" that accompanied the subpoena delivered to Hubbell required that if any document demanded in the subpoena has been "lost, destroyed, deleted, altered, or otherwise disposed of," the target must, *inter alia*, describe the subject matter of the document and explain the circumstances and the reasons for its loss, destruction, deleting, etc. Joint App., *supra* note 38, at 53. Given the grant of immunity that accompanied the subpoena, this requirement is understandable, but use immunity should prevent the government from using the explicit testimonial response that the item was destroyed. Requiring an explicit explanation would seem to pose problems for the prosecution of the target for that destruction, absent careful and effective screening of that prosecution from the statement.

## 2. *The Distinctions Between Do or Did Possess and Do or Did Exist*

The hypotheticals posed in the *Hubbell* litigation present the question of whether, to establish a "foregone conclusion," the government must show that at the time the subpoena was served the items still existed and were at an identifiable location. Instead, could the government merely prove that the items did exist at some reasonably recent date and were, at that or another earlier time, in the target's possession?<sup>184</sup> *Fisher* did not examine temporal issues at all because the government knew the records at issue were held by specified third parties. However, prosecutors have a difficult time showing present existence and possession when easily concealed or readily destructible evidence is believed to be in the target's possession or control. *Hubbell* also did not deal with the temporal question, but for the quite different reason that the government could not show knowledge of existence of the documents at any time.

The prosecution frequently may have evidence that establishes an item's existence and the target's possession at some time in the past. As to many items, continued existence may also be logically inferred, but a reasonable inference is not the same as a "foregone conclusion" as to existence, let alone a "foregone conclusion" of the item's present location. If the function of the "foregone conclusion" concept is to eliminate, not simply to reduce, then the communicative aspect of production under the theory that the prosecutor already knows the information, simply a reasonable inference of continued existence and possession often will not prove sufficient. However, the lower courts do not appear to use a rigorous standard, where, for example, possession of a set of documents was found to be a "foregone conclusion" because the documents were known to be in the target's hands nine weeks earlier.<sup>185</sup> That evidence might be satisfactory to establish probable cause, but it should not be sufficient to establish current possession as a "foregone conclusion."

The acts of hiding or destroying evidence may be criminalized, or an inference of guilty knowledge may be drawn from failure to account for the evidence. These mechanisms would reduce the benefits a target would receive

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184. Some lower court opinions do require a showing that the items are presently in the target's possession, *see, e.g., In re Grand Jury Subpoenas Duces Tecum*, August 1986, 658 F. Supp. 474, 482 (D. Md. 1987), and set the time the subpoena is served as the relevant time for possession. *United States v. Rue*, 819 F.2d 1488, 1493 (8th Cir. 1987). Others seem to ignore the temporal issue.

185. *Rue*, 819 F.2d at 1493. The court gives some reasons to believe the documents were not moved and their possession was in fact a "foregone conclusion" after nine weeks – "the nature of the documents, the nature of the business to which the documents pertained, [and] the absence of any indication that the documents were transferred to someone else or were destroyed." *Id.* These factors make the claim plausible that possession was established, but in my judgment the evidence would not satisfy the "foregone conclusion" standard with the specificity that terminology connotes.

from hiding or destroying evidence when prosecutors can establish the existence of the item and the target's possession of it in the recent past. However, it is unclear whether, under existing Fifth Amendment theory, the target's actions of concealing or destroying evidence before production is ordered can eliminate the protection against compulsory self-incrimination. Also, there are no obvious alternatives to using the serving of the subpoena as the time when concealment or destruction voids Fifth Amendment protection.<sup>186</sup> Whether the Fifth Amendment should draw a distinction between hiding and destroying evidence is even less clear.<sup>187</sup>

### *C. The Significance of Forced Disclosure of Possession of Documents or Tangible Items*

#### *1. Testimonial Aspect of Possession*

On many of the occasions when the *Hubbell* opinion mentioned that the government learned of the existence of the documents through use of the mind or truth-telling, it linked existence with a second factor – "location" or "whereabouts."<sup>188</sup> As noted earlier, the implications of *Hubbell* are potentially quite far-reaching if the Court meant to treat the government's lack of knowledge of location as having the same impact as lack of knowledge of existence with respect to use of a document's contents.<sup>189</sup>

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186. See *supra* note 184 and accompanying text (discussing timing of government's knowledge of subpoenaed items as it relates to foregone conclusion doctrine). The time the subpoena is served appears to be the critical point for application of the "foregone conclusion" doctrine.

187. Unless a target hides an item by tossing it into a deep body of water, for example, a target can still retrieve and produce the item if it is hidden rather than destroyed. As a result, a truthful response to the demand for production of many hidden items will be delivery of the item. Thus, the options for the target are: (1) to be truthful and to incriminate, (2) to lie, or (3) to refuse to produce and be held in contempt. Destruction or its equivalent ("deep sixing" in the Potomac River) means that, without direct adverse consequences, the defendant may answer truthfully that he or she does not possess the item and cannot produce it. As a result, if use immunity prevents use of answers that the item no longer exists, destruction would entail less direct punishment to the target than hiding it, which seems a misguided result.

If the Fifth Amendment were freely malleable, a policy driven formulation of it would most strongly discourage destruction of evidence. See Stuntz, *supra* note 6, at 1256-57, 1279 (arguing that law discourages destruction of evidence, as opposed to failure to readily disclose incriminating evidence, and that much of Fifth Amendment doctrine may be explained by law's tendency to excuse defendant's actions that are more understandable and less culpable than evidence destruction). Such purely policy driven analysis also would provide some justification for sanctions that discourage destroying and/or hiding evidence even before the subpoena is served, with sanctions increasing as the investigation progresses. However, the place of such variable sanctions within the developed Fifth Amendment doctrine is quite uncertain.

188. *United States v. Hubbell*, 120 S. Ct. 2037, 2048 (2000).

189. Lack of knowledge of existence means *a fortiori* that the government lacks knowledge of location or whereabouts. If one has no information that an item exists, knowledge that the

The practical factual problem is quite substantial. In situations involving readily mobile objects, typical knowledge of existence will not constitute knowledge of location. Indeed, for readily destructible items, such as specific documents, the government's abundant knowledge that they existed at some point neither proves the continued existence of the critical documents nor establishes their current location.<sup>190</sup> Avoiding a Fifth Amendment violation frequently may prove difficult if the *Hubbell* Court meant that in order to use the contents of documents, the government must demonstrate knowledge of continued existence and knowledge of present location in addition to knowledge of existence at an historical time. Perhaps instead, the *Hubbell* Court may have meant to assert, or will assert in the future, that use of a document is a fruit only of lack of knowledge of the subpoenaed item's existence at some relevant time, such as during the investigation. However, nothing in the opinion supports an interpretation that eliminates entirely the significance of knowledge of whereabouts of the document when the issue is the use of contents of documents. The opinion also does not support an interpretation which would allow substantial latitude as to the time when knowledge of the whereabouts must be shown.

Instead, I want to make a different assumption and explore the possibility that using the contents of a document violates the privilege against self-incrimination unless the government establishes that it had both knowledge of the document's existence and its location at the time the subpoena was served (or issued). Moving in this direction has intuitive appeal in that it encourages applying related tests to meet Fourth and Fifth Amendment objections.<sup>191</sup>

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item is in anyone's possession is necessarily absent. The court of appeals expressed this observation when it stated that the government had no knowledge of "actual existence, let alone their possession by the subpoenaed party." *United States v. Hubbell*, 167 F.3d 552, 585 (D.C. Cir. 1999), *aff'd*, 120 S. Ct. 2037 (2000). Thus, when the Supreme Court spoke of lack of knowledge of possession associated with lack of knowledge of existence, it necessarily was true in a case where the government lacked knowledge of the very existence of the documents. The opposite, however, is not true. Knowledge of existence does not mean that the government will have knowledge of location, particularly present location in the possession or control of the target. Also, lack of knowledge of location does not necessarily mean that existence (at least at some time in the past) is unknown.

190. The problem of showing present knowledge may be particularly acute as to specific items in a class. Knowledge regarding a critical document often will only relate to the existence of the class, and showing the continued existence and precise location of specific items in that class may prove particularly difficult.

191. The revised shape of the act of production doctrine suggested in this Article does not reinstate *Boyd* because private documents would still be given no special protections when seized under authorization of the Fourth Amendment and the Fifth Amendment would still allow law enforcement officials to require targets to surrender incriminating documents.



## 2. Relationship to Probable Cause

Grand juries may issue subpoenas for evidence on less than probable cause.<sup>192</sup> The use of a lower standard can be justified in several ways. One, which may be largely unappreciated by targets, is that a subpoena does not require government entry into private space to conduct a search for the evidence. Instead, the government asked the target to produce the item through his or her own efforts.<sup>193</sup> As a result, Fourth Amendment violations are avoided both for targets and for innocent third parties whose homes and businesses might have otherwise been subjected to an intrusive search. However, from the target's perspective, being required to reveal the contents of the mind may be as substantively intrusive as a search of private space, albeit an intrusion upon a different constitutional right. One remedy would be to require probable cause for compelling production of evidence from a target, but this result would require radical remaking of grand jury doctrine.<sup>194</sup> Another justification for a standard lower than probable cause to secure items for the grand jury arises from the purpose of the grand jury. Because the purpose of the grand jury is to establish probable cause at the end of its work, requiring probable cause as to each subpoena would be illogical and self-defeating.<sup>195</sup>

Although the required showing to establish a "foregone conclusion" to eliminate the testimonial element of production under a subpoena is more

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However, the altered doctrine is similar to *Boyd's* sentiment that the protections under the Fourth and Fifth Amendment move toward each other when the target produces items. *Cf. Boyd v. United States*, 116 U.S. 616, 630 (1886) ("In this regard the fourth and fifth amendments run almost into each other.").

192. See *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991) (discussing standard for issuance of grand jury subpoena).

193. The district court in *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal. 1972), *rev'd*, 436 U.S. 547 (1978), noted two advantages of subpoenas over search warrants for third parties – lesser intrusion and ability to challenge subpoena before the intrusion occurs:

It should be apparent that means less drastic than a search warrant do exist for obtaining materials in possession of a third party. A subpoena duces tecum, obviously, is much less intrusive than a search warrant: the police do not go rummaging through one's home, office, or desk if armed only with a subpoena. And, perhaps equally important, there is no opportunity to challenge the search warrant prior to the intrusion, whereas one can always move to quash the subpoena before producing the sought-after materials. This procedural difference is important. Mistakes in the issuance of a warrant or subpoena have occurred; motions to suppress and motions to quash are not uncommon. In view of the difference in degree of intrusion and opportunity to challenge possible mistakes, the subpoena should always be preferred to a search warrant, for non-suspects.

*Id.* at 130.

194. Such a decision would indeed return the state of the law to that espoused in *Boyd*.

195. See *R. Enters., Inc.*, 498 U.S. at 297 (discussing role of grand jury).

onerous than probable cause, the showing required to establish probable cause is more demanding than imposed for issuance of a grand jury subpoena. The latter standard is merely that the subpoenaed evidence has some likely relevance to the grand jury's investigation. Therefore, while applying a probable cause standard, as opposed to the more onerous "foregone conclusion" showing, might be seen as a move in the right direction, applying the probable cause standard generally to subpoenas when targets are involved would still impose significant limitations on the issuance of subpoenas. The change also would conflict with a substantial body of precedent. For these reasons, adopting a probable cause standard is an unlikely solution to any remaining problems with subpoenas for evidence from targets.

Although the probable cause standard is too demanding for application to all elements of subpoenas, it is too lax to eliminate Fifth Amendment protections. The ability to make out probable cause and, therefore, to obtain a search warrant is not equivalent to meeting the "foregone conclusion" requirement. As developed earlier,<sup>196</sup> the "foregone conclusion" concept eliminates the testimonial element of the act of production. For this purpose, the government must know the fact with such certainty that it is uninterested in the implicit testimony given through the act of production. The terminology "foregone conclusion" suggests a more onerous showing than probable cause, and, in Fifth Amendment theory, the more demanding standard should be required.<sup>197</sup>

Alternatively, if the government could show that it had adequate knowledge of the existence and location of evidence tending to prove a crime, that knowledge would have been sufficient to obtain a search warrant and allowed the government to secure the items through a search. Under the "inevitable discovery" doctrine, such a showing could establish an independent source for the items and their contents, and, therefore, use immunity would not be vio-

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196. See *infra* Part III.D (developing theory and function of "foregone conclusion" concept).

197. Although no remedy may be available for a Fifth Amendment violation where the evidence was or could have been obtained through an independent source, the lack of a remedy does not mean that the constitutional violation never occurred. By contrast, when the prosecution establishes "foregone conclusion," it eliminates the constitutional violation, and greater knowledge than probable cause should be required for that purpose.

On the other hand, while the existence of full fledged probable cause does not eliminate the violation, it may render that violation harmless through the concept of inevitable discovery. Because the incrimination is contained in a fixed document, proof that the same document would have been discovered through a lawful search eliminates the full effect of the constitutional violation. When it is oral testimony that was tainted it is often not possible to eliminate the full effect of the constitutional violation in a similar manner. See *United States v. North*, 910 F.2d 843, 872 (D.C. Cir. 1990) (ruling that lack of taint could be established where evidence is fixed or "canned" before immunized testimony was received).

lated.<sup>198</sup> Thus, where the government can show that it knows of the existence and present location of potentially incriminating items, it can establish an independent source for the evidence. However, that alternative has limited usefulness in avoiding the restrictions of the Fifth Amendment because, as noted above, grand jury subpoenas do not require a showing of probable cause that the evidence sought is evidence of a crime.<sup>199</sup> Moreover, the information required to make such a showing often will be unavailable.

Further, a showing of knowledge of present existence and current location of an item sufficient to show probable cause often will be inadequate to establish an independent source. In this context, a prosecutor would establish an independent source through the "inevitable discovery" concept, which would require not only probable cause, but also a showing that the police would have found the evidence when they executed the search warrant. When an item is discovered by a warrantless search, all that is lacking to prove inevitable discovery is a showing that the police had sufficient evidence to obtain a search warrant and would have obtained it.<sup>200</sup> By contrast, when the

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198. The Supreme Court first recognized the inevitable discovery doctrine in *Nix v. Williams*, 467 U.S. 431, 450 (1984). In that case, the Court concluded that evidence should not be excluded even when it was discovered as a result of a Fourth Amendment violation if the evidence inevitably would have been discovered by alternative, legally proper means. *Id.* at 448. Although the "inevitable discovery" doctrine is functionally similar to the "independent source" concept, it differs in that when "inevitable discovery" is involved the discovery through independent means is hypothetical rather than actual. *Id.* at 443-44. The "inevitable discovery" doctrine eliminates the need to prove that no use or derivative use was made of documents where those documents would clearly have been discovered through means lawful under the Fourth Amendment. Moreover, the doctrine imposes no special burden of proof, only a preponderance of the evidence standard applies. *Id.* at 444.

199. The Fourth Amendment requires that probable cause must be established not only for location but also for a connection between some criminal activity and the items sought. See 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 3.1(b), at 6-8 (3d ed. 1996) (quoting Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961)).

200. See *Murray v. United States*, 487 U.S. 533, 539-44 (1988) (developing requirements of inevitable discovery in context of warrantless seizure of evidence). The Court ruled the evidence admissible when a warrant was later obtained because the pre-existing probable cause provided a basis in the independent source/inevitable doctrines for its lawful acquisition. *Id.* at 537-44. In applying the independent source/inevitable doctrines, the Court was not required to speculate whether the evidence would have been found through a search because, in fact, it had been found through a search.

Perhaps where probable cause exists, courts should require that the prosecution first attempt to secure the evidence through a search warrant because of its clarifying effect on whether the evidence could be obtained through alternative means. However, outside of a few specifically protected interests, such as the First Amendment, the United States Supreme Court generally has avoided imposing preferences among constitutionally permissible courses of action, and it particularly has avoided imposition of a such a "least restrictive alternative" analysis in its Fourth Amendment analysis. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S.

target produces an item in response to a subpoena, production does not show that an officer would have found the item through a search. On the other hand, if location were truly a "foregone conclusion, the requisite showing of immediate knowledge of the item's whereabouts necessarily would mean that a search would have been successful. Thus, in a number of situations, Fourth and Fifth Amendment requirements may move toward each other, but they do not merge.

### 3. *A Continuing Uncertainty About Hubbell's Impact on Significance of Whereabouts of Documents*

*Hubbell* significantly changed the act of production doctrine if the Court meant to say that when the target's truth-telling is required to reveal the current location of any subpoenaed item, the use of the item is a fruit of a Fifth Amendment violation and, therefore, those contents are off limits to the prosecution whether or not use immunity is granted. The question remains, however, is this the correct interpretation of *Hubbell*?

On the one hand, no easy stopping points immediately reveal themselves short of this conclusion. Perhaps the Court meant to accomplish this result, but it did not explicitly state such a radical outcome. In one description of what it intended to allow, the Court drew a distinction between "telling an inquisitor the combination to a wall safe," which it indicated is forbidden under the Fifth Amendment, and "being forced to surrender the key to a strongbox," which is allowed.<sup>201</sup> The Court did not indicate that the target only needed to surrender

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543, 556 n.12 (1976) (concluding that possibility that alternatives to border checkpoints could stem flow of illegal aliens should not be considered in determining whether checkpoints were constitutional and that such approach would invalidate most search and seizure procedures).

Where the police attempt a search and fail, both the inevitable discovery argument and the "foregone conclusion" position are left in ruins. As a result, the government may be discouraged from taking the search-first approach. On the other hand, the prosecution may, nevertheless, be persuaded to adopt a search-first policy because criminals predictably will not respond honestly to a subpoena request if a viable alternative exists. Unlike a subpoena, a search does not depend on the target's cooperation.

Establishing inevitability of discovery through a search would be quite simple if a rigorous formulation of the "foregone conclusion" concept, rather than probable cause, were required for possession of the evidence. The same showing that would establish knowledge of location also would establish that probable cause existed. If the item was produced in response to a subpoena, from the location specified in the subpoena, then a court can assume that the police would have found it through a search of that same location. If the target produced the item, he or she will have demonstrated that until the moment of service of the subpoena the document had not been moved or destroyed, fixing the item's location at that moment. There could, therefore, be no harm to the target's interests in proceeding by subpoena rather than a search.

201. *United States v. Hubbell*, 120 S. Ct. 2037, 2047 (2000) (observing that because respondent had to use "the contents of his own mind" to select documents for production, derivative use of produced documents was precluded by grant of immunity).

the key to the strongbox if it could have been obtained by a search warrant because its continued existence and present location were known. "Surrender" could be so interpreted, and those rigid requirements were met in *Schmerber v. California*, in which the Court approved the taking of the target's blood.<sup>202</sup> While "surrender" may be given this restricted meaning, that interpretation is not inevitable. Whether the Court intended to narrow the effective scope of subpoenas for evidence directed to targets remains uncertain.

#### *D. Possession and Incrimination*

If the Court's analysis in *Hubbell* depends solely on whether the target's truth-telling is required to comply with the subpoena, then the Court would be significantly revising the requirements of incrimination as set out in *Fisher*. As noted earlier, a Fifth Amendment violation requires compulsion, which is automatically provided by the subpoena, and two additional components: a testimonial act and potential incrimination.<sup>203</sup> The act of producing the item may be testimonial in that it shows that the target had possession or access to the item. However, is the act of producing an item potentially incriminating?

In *Fisher*, the Court concluded that the act of production was neither testimonial nor incriminating.<sup>204</sup> The Court decided the act was not testimonial because both existence and possession were a "foregone conclusion."<sup>205</sup> With regard to incrimination, the Court stated:

[S]urely it is not illegal to seek accounting help in connection with one's tax returns or for the accountant to prepare workpapers and deliver them to the taxpayer. At this juncture, we are quite unprepared to hold that either the fact of existence of the papers or of their possession by the taxpayer poses any realistic threat of incrimination to the taxpayer.<sup>206</sup>

The *Fisher* Court construed incrimination narrowly and did not consider the papers potentially incriminating contents in determining whether the act of production incriminated the target.<sup>207</sup> I previously have argued that such a narrow analysis of incrimination, one which excludes the document's contents from consideration, does not withstand logical analysis when applied to an

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202. *Schmerber v. California*, 384 U.S. 757, 767 (1966) (holding that incriminating, compulsory blood test evidence was neither testimonial nor evidence related to communicative act and, therefore, was not barred on Fifth Amendment grounds).

203. See *infra* Part III.A-III.C (describing three requirements of Fifth Amendment violation in context of complying with subpoena duces tecum).

204. See *Fisher v. United States*, 425 U.S. 391, 411-12 (1976).

205. *Id.* at 411.

206. *Id.* at 412.

207. *Id.*

act of production that establishes the existence of incriminating documents of which the government was unaware.<sup>208</sup>

In *Doe I*, the Supreme Court reached a different result than *Fisher* regarding whether the production of business documents involved testimonial self-incrimination.<sup>209</sup> The *Hubbell* holding that the production of subpoenaed documents would involve testimonial self-incrimination clearly adopts *Doe I*'s answer to the question of whether the production of documents unknown to the government is testimonial.<sup>210</sup> *Hubbell* implicitly reaffirms that such an act is incriminating, a result that must rest on the incriminating quality of the contents of the documents. The question remains whether the *Doe I* and *Hubbell* opinions likewise establish that the contents of the subpoenaed documents may be examined to determine whether the act of production contains incriminating evidence regarding possession, location, or whereabouts.

I have previously argued that it is sensible to consider the incrimination component more narrowly when examining an act that demonstrates possession as opposed to one that establishes knowledge. In the latter situation (existence), the government's only knowledge of the document is as a result of the target's response to a subpoena. Any use of the contents of that document involves exploitation of the knowledge gained by the response to the subpoena. Possession seems to invoke concepts of access more than communication of information. However, if the focus is on the simple requirement that the target's truthtelling is involved in production, then my earlier distinction may be ill founded. When the focus is on truthtelling, the same Fifth Amendment violation should be found from a revelation of the location or whereabouts of evidence through its production as from a revelation of existence. Truthtelling would be an equally critical component of the government's acquisition and exploitation of the evidence in either situation.

According to *Fisher*'s analysis, an action of production proving location is incriminating without a detailed examination of the contents of the docu-

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208. Mosteller, *supra* note 6, at 19, 26-27 (discussing fact that production of subpoenaed materials confirms existence of those materials).

209. See *Doe I*, 465 U.S. 605, 613-14 n.12 (1984) (affirming district finding that production of subpoenaed documents would involve testimonial self-incrimination). But cf. *id.* at 617 n.17 (rejecting contention that all grants of use immunity cover both document contents and act of production). The court of appeals in *Hubbell* concluded that acknowledging existence of two sources of incriminating documents "provided a link in the chain of evidence used by the Independent Counsel to substantiate the criminal charges against . . . [Hubbell] — an instance of indirect incrimination." *United States v. Hubbell*, 167 F.3d 552, 582 (D.C. Cir. 1999), *aff'd*, 120 S. Ct. 2037 (2000).

210. See *United States v. Hubbell*, 120 S. Ct. 2037, 2048 (2000) (concluding that testimonial aspects of respondent's act of production precluded compelled production without prior grant of immunity).

ment or item produced when: (1) possession of the item itself is a crime (such as with contraband); (2) current possession or access helps establish possession or access at an earlier relevant time (such as when the crime occurred using the item); (3) possession helps to establish guilty knowledge, (4) possession helps authenticate an item by circumstantially linking the item to its possessor;<sup>211</sup> and (5) lack of possession of items that should be in the target's possession helps either to prove guilty knowledge or fraud.<sup>212</sup> I have argued that, in the absence of one of these more direct uses of possession or location to incriminate, the act of production should not be protected under the Fifth Amendment and, therefore, should not require use immunity even if possession is not established as a "foregone conclusion." I reached this conclusion largely for the practical reason that any other conclusion effectively would undo *Fisher*. As I noted in an earlier Article:

[A]dmission of possession through production is significant under the fifth amendment only where it has incriminating potential apart from divulging to the prosecution information about the present location of the incriminating item. If revealing the present location of the incriminating document were sufficient to trigger the fifth amendment, the privilege would allow the witness to protect an item or document, absent a showing that its present location was a "foregone conclusion," simply because its contents were incriminating. Such a broad construction of the privilege would violate *Fisher's* holding that an item is not protected simply because its contents are incriminating.<sup>213</sup>

With *Fisher* badly damaged, if not obliterated, by *Hubbell*, it is far from clear whether my position remains viable that a distinction should exist between the treatment of existence and possession for any purpose. Practical considerations may support some distinction, but it lacks a clear theoretical basis.

The critical question is whether a specifically identified, facially innocuous business or personal document (such as a diary) that is known to exist can be subject to subpoena, regardless of its incriminating contents, because proof of possession is not deemed incriminating. If the answer is yes, whether the prosecutor knows the location of the documents becomes irrelevant. However, if contents routinely are considered when determining whether posses-

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211. Mosteller, *supra* note 6, at 25 (listing different ways that possession of items may prove to be incriminating irrespective of incriminating factual content of item).

212. See, e.g., *United States v. Sasser*, 974 F.2d 1544, 1558-59 (10th Cir. 1992) (finding that failure to produce documents, which would factually negate its existence, could not be used to prove non-existence of certificate of deposit upon which fraud charge was based).

213. Mosteller, *supra* note 6, at 25-26 (examining apparent fundamental inconsistency between considering incriminating quality of document when possession is at issue and general refusal of *Fisher* to give incriminating documents protection under Fifth Amendment).

sion is incriminating, establishing the whereabouts of the documents as a "foregone conclusion" becomes theoretically critical, but practically difficult. *Hubbell* certainly changes the atmosphere for resolving this critical question.

Earlier in this Article, I offered three hypotheses on how the incrimination issue might be resolved.<sup>214</sup> Of these three possible solutions, the first was to preserve *Fisher*'s narrow construction of incrimination (i.e. incrimination is determined without considering the contents of the documents for both possession and existence). This solution can no longer be supported. Although the Court has not explained the error in Justice White's statement in *Fisher*,<sup>215</sup> it certainly has not followed that narrow construction of incrimination.

My two other hypotheses – that incriminating contents may be considered when existence is unknown to the authorities, but not when possession (location) is the issue, and that incriminating contents may be considered when the authorities lack knowledge of either the item's existence or its possession (location) – remain viable after *Hubbell*. Indeed, I believe either of these two results may fit a post-*Hubbell* analysis.

A majority of the *Hubbell* Court may have reached the simple but important conclusion that the Fifth Amendment could not be read as narrowly as Justice White's majority opinion in *Fisher* suggested, given that such a reading inevitably undercuts essential anti-inquisitorial components of the right against self-incrimination.<sup>216</sup> Alternatively, a dramatic change in analysis from *Fisher* may be taking shape, but this change in the treatment of the incriminating quality of possession may be the result of the entry of immunity analysis into the mix, with its rigorous procedures for protecting against both direct and indirect uses of immunized evidence. The court of appeals noted the difference between the incrimination requirement when used to determine whether the Fifth Amendment applies to production and the prohibition against derivative or indirect use of evidence once the Fifth Amendment has been found applicable.<sup>217</sup> Nevertheless, it examined the contents of the docu-

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214. See *supra* Part III.C (describing major competing alternatives after *Hubbell* decision for how courts should treat incriminating quality of documents in determining whether act of production is incriminating).

215. *Fisher v. United States*, 425 U.S. 391, 412 (1976).

216. See *supra* Part V.B.1 (reciting hypotheticals posed, inter alia, by Supreme Court justices, which suggest their unease with inquisitorial implications of government's position).

217. The court of appeals faulted the district court for inappropriately employing use immunity analysis concerning contents to determine whether the OIC violated *Hubbell*'s privilege against self-incrimination. *United States v. Hubbell*, 167 F.3d 552, 580 (D.C. Cir. 1999), *aff'd*, 120 S. Ct. 2037 (2000) (concluding that in considering lack of OIC knowledge of contents of documents, as opposed to existence of such basic documents, "the district court improperly conflated this *Fisher/Doe I* inquiry with the conceptually separate and temporally subsequent *Kastigar* inquiry").



ments under an "indirect incrimination" analysis to determine whether the act of production incriminated under the Fifth Amendment.<sup>218</sup> While the court of appeals applied the indirect incrimination concept only to the issue of existence, it did not explain (and it is conceptually unclear) why it would not also apply the indirect incrimination idea broadly to possession.

Finally, possession of incriminating documents may be held to incriminate as a result of a more sensitive factual construction undertaken in the aftermath of *Doe I* and *Hubbell* rather than from some broad theoretical reformulation. The court of appeals noted that possession of incriminating documents might eliminate the defense of lack of knowledge.<sup>219</sup> If courts consider possession of documents with incriminating contents incriminating simply because such possession could help to refute a defense of lack of knowledge,<sup>220</sup> the incrimination requirement will turn, as a matter of fact, on an analysis of whether the contents of a document are incriminating.

As discussed in earlier segments, the statements in *Fisher* about incrimination do not appear to contemplate any of these expansive methods of meeting the incrimination requirement.<sup>221</sup> Most likely, lower courts will finesse the issue in the typical documents case, which involve large numbers of documents, with a range of possible theories of incrimination. They may embrace a "fuzzy" analysis under which possession of some documents may incriminate and find that non-trivial, but uncertain possibility of incrimination sufficient. When they deal with individual items, courts typically will consider viscerally incriminating objects such as weapons. As a result, a clear resolution of the conceptual issue may not come quickly. The uncertainty should be

218. *Id.* at 582 (examining potential impact of production of materials demanded by subpoena).

219. *Id.*

220. Possession of documents would not appear meaningfully to support the ability of many documents to incriminate individuals. For example, when a person wrote a document, his or her subsequent possession only shows guilty knowledge or helps to refute an absence of guilty knowledge argument otherwise shown by authorship. Such possession only adds trivially to incrimination. On the other hand, possession does tend to show guilty knowledge or negate a defense based on the absence of knowledge if the documents have incriminating contents and were prepared by others. See, e.g., *In re Grand Jury Subpoenas Duces Tecum Dated June 13 1983 & June 33, 1983*, 722 F.2d 981, 982-87 (2d Cir. 1983) (concluding that complying with subpoena would incriminate by showing possession of documents by former corporate president who was target of a fraud investigation involving company's reorganization and who no longer had right to possess documents). However, Justice White's statement in *Fisher* about the limited incrimination effect of possession either resulted from missing this insight or finding it insufficient.

221. On the other hand, *Doe I* implicitly may signal a different result. In that case, the Court adopted the lower courts' finding that testimonial incrimination existed apparently for possession as well as existence. *Doe I*, 465 U.S. 613-14 n.11 (1984).

resolved, however, if the item subpoenaed and produced is the target's personal diary that incriminates only through the information he or she wrote in it.<sup>222</sup> Whatever the theory, *Fisher*'s cramped concept of incrimination at least was altered substantially, if not obliterated, by the result and perhaps the rhetoric used in *Hubbell*.<sup>223</sup>

On the other hand, perhaps a future Court will draw a distinction between incrimination through informing the government that a document of a certain character exists – even though the mere fact that it has such a general character is not incriminating – and a target's admitting that it possesses a document of that character. If so, the effect would be to treat most documents differently than tangible objects, such as weapons and contraband, which incriminate based on the general character of the item rather than through an examination of its specific contents. Whether there is a basis in Fifth Amendment theory (as opposed to practicality) for such a distinction between existence and possession is far less clear after *Hubbell*'s gloss than before the case was decided. However, it is undeniable that the text of the opinion did not rule on this set of issues.

*E. The Function of "Reasonable Particularity" Test or Its Equivalent as a Mechanism for Implementing the "Foregone Conclusion" Principle*

As discussed earlier, document production does not violate the Fifth Amendment under *Fisher* if the information communicated is itself a "foregone conclusion." Furthermore, in *Hubbell*, the court of appeals adopted the Second Circuit's standard of "reasonable particularity" to implement the "foregone conclusion" concept.<sup>224</sup> The court of appeals indicated that the "reasonable

222. Because the diary was seized through a search, *Moyer v. Commonwealth*, 531 S.E.2d 580, 583-87 (Va. Ct. App. 2000) (en banc) (holding that seizure of diary by law enforcement officials does not violate privilege against self incrimination), does not present such a case. In order to test the issue, a target likely will need to comply with the subpoena and deliver the evidence to the prosecution in a situation where location is not a "foregone conclusion."

223. See *supra* Part IV.C (describing use of broad Fifth Amendment rhetoric and its implications).

224. *United States v. Hubbell*, 167 F.3d 552, 579-80 (D.C. Cir. 1999) *aff'd*, 120 S. Ct. 2037 (2000). The D.C. Circuit adopted the standard articulated in *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d 87, 93 (2d Cir. 1993) (applying "reasonable particularity" test and finding it satisfied where defendant had provided copy of document to government agency). The Second Circuit case, in turn, cited *In re Grand Jury Subpoena Duces Tecum*, 616 F. Supp. 1159 (E.D.N.Y. 1985) for the proposition that production may not be refused "if the government can demonstrate with reasonable particularity that it knows of the existence and location of subpoenaed documents." *In re Grand Jury Subpoena Duces Tecum*, 616 F. Supp. at 1161. Neither the Second Circuit case, nor the district court decision it quoted, gave a definition of "reasonable particularity."

particularity" standard would apply to knowledge of existence, possession, and authenticity. However, it concluded that it was in no position to decide whether OIC had satisfied that standard and remanded the case to the district court for further factual development.<sup>225</sup>

While the circuit court applied the "reasonable particularity" standard to all three of the communicative acts, it applies best to proof of existence, which was the court of appeals's key concern.<sup>226</sup> The appellate court highlighted two factors. First, the court looked at the "quantum of information possessed by the government before it issued the . . . subpoena"<sup>227</sup> and the "quantum of information that the government seeks to extract through compelling the expression of the contents of the individual's mind."<sup>228</sup> The gap between these two levels of knowledge, with particular emphasis on the knowledge required from the target, was central to the court's determination of whether the act of production is communicative.<sup>229</sup> Second, the court of appeals rejected the OIC's attempt to establish its knowledge of the existence of Hubbell's records by describing them in "generalized terms of business, financial and tax records,"<sup>230</sup> while using his status as a consultant and a taxpayer to establish that he had such records.<sup>231</sup> The court explained that there are no essential classes or categories of records and that categories such as those proposed by the IOC were highly capable of manipulation.<sup>232</sup>

Part of what the circuit court was attempting to do with its "reasonable particularity" standard was to translate the "foregone conclusion" concept into a workable test for the world of documents, so that results, if not documents, could be classed and categorized. Although the government must prove that it knew of the existence of the documents themselves, the court of appeals ruled, contrary to the district court's conclusion, that the government was not required to establish that it knew of the information contained in the documents.<sup>233</sup> Thus, under this test the government must show that it knows that a specific document or type of documents exists, but it need not know the information contained in them.

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225. *Hubbell*, 167 F.3d at 585.

226. *Id.* at 578 n.33, 580, 582, 583 (focusing on existence separate from authenticity or possession).

227. *Id.* at 569.

228. *Id.* at 575.

229. *Id.* at 576. I suggest that, regarding "foregone conclusion," the critical analysis is instead on how much information the government possessed.

230. *Id.* at 578.

231. *Id.* at 579.

232. *Id.* at 578-59.

233. *Id.* at 580.

Although overstating its position somewhat, the OIC made a reasonable point in its argument to the Supreme Court when it argued that requiring "reasonable particularity" implicitly moved the determination in the direction of requiring knowledge of contents of documents. The OIC argued:

Only by its contents – what it says, not its shape, size or texture – may a document be described with any particularity, for it is those contents that give the document significance. Thus, a standard requiring identification of a document with reasonable particularity, is in effect, a standard that demands advanced knowledge of the contents of the document.<sup>234</sup>

Contrary to the OIC's claim, many documents can be described with particularity by their "cover" or container.<sup>235</sup> Some documents, however, will defy such description and, as the OIC argued, require a description of contents to avoid a constitutionally unacceptable generic description. The "reasonable particularity" terminology is designed to make manageable the conflict between general categorization and requiring knowledge of the contents of specific documents. The "reasonable particularity" test does not allow abstract treatment. Instead, the government's specific knowledge that particular documents in fact exist is subject to a context-based examination.

While the "reasonable particularity" terminology is helpful in handling the issue of the government's knowledge of existence, it is far less useful for the question of location or possession. When issues of place and time, rather than categorization, are critical, the rubric of an information gap is of less use than a focus on the specificity of the government's knowledge. However, the common denominator in both situations is that detailed knowledge is required rather than categories and generalization.

Although the Supreme Court in *Hubbell* did not endorse the "reasonable particularity" test, it is the leading candidate for the proper standard given the apparent overall consistency between the Court's approach in *Hubbell* and the circuit court's more detailed treatment of the issues.<sup>236</sup> In this Article, I will not attempt to develop an analysis of how courts apply or should apply the "reasonable particularity" test in concrete cases. Neither the District of Columbia nor the Second Circuit has developed an actual, working definition for the term.<sup>237</sup> Attempting to develop a reasonable application of the concept

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234. Brief for Petitioner OIC, *supra* note 42, at 36.

235. For example, a bank statement could be identified adequately by naming the bank that provides it and the specific month in question, without indication of items within that statement.

236. See *LAFAYETTE AL.*, *supra* note 11, § 8.13(a), at 262-63 & n.27 (stating in text that lower courts generally have adopted this standard, but noting in supporting footnote that "[v]arious formulations have been offered as to how persuasive this demonstration of knowledge must be").

237. As noted earlier, see *supra* note 224, the courts in *United States v. Hubbell*, 167 F.3d 552, 579-80 (D.C. Cir. 1999), *aff'd*, 120 S. Ct. 2037 (2000), *In re Grand Jury Subpoena Duces*

is a daunting task that will require both fine grained factual analysis and consistent, sophisticated categorization.<sup>238</sup> Because the Supreme Court has not only failed to endorse the "reasonable particularity" test, but also has failed to provide real guidance on how to frame the proper test,<sup>239</sup> I see little basis on which to claim that whatever system I might develop should be accepted. For these reasons, I do not attempt in this Article to analyze the test suggested or to develop a different practical test for meeting the "foregone conclusion" requirement.

*F. Justice Thomas's Proposed Redefinition of the Fifth Amendment to Prohibit Compelled Production of Evidence*

Justice Thomas's concurring opinion, which Justice Scalia joined, is worse for the prosecution than the implications of the majority's opinion for the continued utility of immunity applied to targets. Justice Thomas suggested that the Fifth Amendment, contrary to the holdings in the Court's act of production cases, may prohibit not only compelling testimonial communications, but also compelling the production of any evidence.<sup>240</sup> Justice Thomas's interpretation of the Fifth Amendment would provide the same protection to a target responding to a subpoena duces tecum as a target responding to a subpoena requiring testimony.<sup>241</sup> Thus, even if the act of production did not entail any communicative act, the government would violate the Fifth Amendment if the evidence compelled had a tendency to incriminate. Granting use immunity would put any such evidence off limits to the prosecution.

The government lost in *Hubbell* at least in part because of its facts and the posture in which the case was presented, and the government cannot expect

*Tecum*, 1 F.3d 87, 93 (2d Cir. 1993), which *Hubbell* cites, and *In re Grand Jury Subpoena Duces Tecum*, 616 F. Supp. 1159, 1161 (E.D. N.Y. 1985), from which the Second Circuit took the terminology, merely provided an indirect or conclusory definition of the standard.

238. Such categorization would prove extremely difficult, for as the circuit court in *Hubbell* stated, "there are no essential classes or categories of information." *United States v. Hubbell*, 167 F.3d 552, 579 (D.C. Cir. 1999), *aff'd*, 120 S. Ct. 2037 (2000).

239. *United States v. Hubbell*, 120 S. Ct. 2037, 2047, 2048 (2000) (declining even to suggest definition and only noting that "[w]hatever the scope," facts of case at hand clearly fell outside it).

240. *See id.* at 2054 (Thomas, J., concurring) ("I remain open to a reconsideration of that decision [*Fisher*] and its progeny in a proper case . . . in light of the historical evidence that the Self-Incrimination Clause may have a broader reach than *Fisher* holds.").

241. *Id.* at 2050 (Thomas, J., concurring). Justice Thomas was relying on historical research suggesting that, at the time of the framing, the understanding of the term "witness" as used in the Fifth Amendment included both the furnishing of testimony and evidence. *Id.* at 2050-51 (Thomas, J., concurring); *see also* Nagareda, *supra* note 6, at 1603-23 (discussing historical context surrounding development of Fifth Amendment).

much better results in the future. Unless Justices Thomas and Scalia change their position, the prosecution no longer can count on two of the Court's most conservative votes. Some of the most difficult hypothetical questions regarding the dangerous implications of approving the *Hubbell* subpoena came from Justice Scalia.<sup>242</sup> Under the facts of *Hubbell* it was easy to argue that the framers would not have intended the Fifth Amendment to allow prosecutors to compel a target to provide evidence establishing guilt of unknown charges while still being subject to prosecution. The framers did not intend the new American system to have such an inquisitorial feel.<sup>243</sup>

#### VI. Conclusion: The Remnant of Fisher Remaining after Hubbell

The cowboys' wild ride, not only in the arena of *Hubbell* facts, but also through assumed impregnable Fifth Amendment barriers under the courts' hypotheticals, provoked a major reformulation of act of production doctrine.<sup>244</sup> Under a tenable, but admittedly expansive, view of the consequences of this rampage, the prosecution can continue to subpoena evidence from targets and use that evidence against them only when a precise description of the items subpoenaed eliminates the need for the target to select or identify items in the category, when the prosecution clearly knows that the specific items demanded in the category exist, and when it knows their whereabouts at the time the subpoena is served.<sup>245</sup> For this to be a thorough reformulation, the analysis of the incrimination issue must roughly parallel developments regarding testimonial communication, which means that incriminating contents can be con-

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242. See Supreme Court Transcript, *supra* note 166, at 12, 22 (presenting OIC counsel's statement referring to "Justice Scalia's gun hypothesis" and counsel for Department of Justice responding to Justice Scalia's handgun hypothetical).

243. See *supra* note 12 (discussing Justice Frankfurter's statements that "[o]urs is an accusatorial and not an inquisitorial system").

244. See *supra* Parts IV-V (discussing ramifications of *Hubbell* decision).

245. This narrow ambit of effective operation for subpoenas directed to individuals may be very close to the position that Justice Marshall envisioned in his concurring opinion in *Fisher*, which reads like either a dissent or a proposal for reformulation. *Fisher v. United States*, 425 U.S. 391, 430-34 (Marshall, J., concurring in judgement). Marshall suggested that because of the difficulty of establishing "present existence and possession of most private papers," and because there is "a precise inverse relationship between the private nature of the document and the permissibility of assuming its existence," private documents would remain almost as unavailable to the prosecution after *Fisher* as they had been under *Boyd*. *Id.* at 432-33. After *Hubbell*, Justice Marshall's view of the lasting impact of *Fisher* may be more accurate than Justice White's articulation in the opinion for the majority.

Following the logic of Marshall's argument, a target's actions that successfully hide items before the subpoena was served would defeat the subpoena. On the other hand, hiding or destruction of evidence after the subpoena was served would remain subject to direct sanction that is not prohibited by the Fifth Amendment.

sidered when possession of the document is the issue. Whether courts should so reformulate incrimination analysis is not at all clear. However, without reformulation, the apparently minor issue – incrimination – may come to the forefront as courts sift through the wreckage in an effort to salvage some way to continue forcing targets to surrender pre-existing incriminating documents.

How protective the courts will prove to be when the issue is the target's possession of an item rather than its existence and how incrimination analysis will play out as to possession are the major puzzles remaining after *Hubbell*. Resolution of these issues will likely be interconnected. The Court's conclusions either will allow the anti-inquisitorial sentiment of *Hubbell* to invalidate subpoenas demanding that targets produce evidence that could incriminate them or will permit the Court to distinguish subpoenas for documents, where production might continue in a limited fashion, from other more facially incriminating items of physical evidence, whose compelled surrender appeared to greatly trouble the courts in *Hubbell*.

Any reconstruction of OIC's wreckage, however, must wait until another day. The Court found it sufficient to re-establish in *Hubbell* that the fundamental components of Fifth Amendment doctrine apply to document production.

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