Winter 2001

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SUPREME COURT REVIEW

FOREWORD: FISHER GOES ON THE QUINTESSENTIAL FISHING EXPEDITION AND HUBBELL IS OFF THE HOOK

H. RICHARD UVILLER

I must confess that what first drew me to the Supreme Court’s decision last term in the case against Webster Hubbell was not the celebrity of the protagonist, but the Court’s paraphrase of the position of Judge Williams, dissenting in part at the circuit level. As Justice Stevens for the Supreme Court recounted it:

In the opinion of the dissenting judge, the majority failed to give full effect to the distinction between the contents of the documents and the limited testimonial significance of the act of producing them. In his view, as long as the prosecutor could make use of information contained in the documents or derived therefrom without any reference to the fact that respondent had produced them in response to a subpoena, there would be no improper use of the testimonial aspect of the immunized act of production. In other words, the constitutional privilege and the statute conferring use immunity would only shield the witness 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.”

This opinion states precisely how I have taught the law of implicit self-incrimination by compliance with a subpoena *duces tecum*—the so-called “act of production” extension of the “testimonial or communicative” boundaries of the Fifth Amendment

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3 *Hubbell*, 530 U.S. at 34.
monial or communicative" boundaries of the Fifth Amendment "privilege." Ever since the progenitive case, Fisher v. United States, was decided in 1976, I have carefully explained to bewildered students that the Fifth Amendment "privilege" can be asserted against a subpoena ducès tecum only in the rare case where the prosecutor proposes to use the evidence of compliance with the subpoena as inculpatory in itself. Seizing a document and making evidentiary use of the information it contains—directly or indirectly—may be a violation of the Fourth Amendment right to security in your papers and effects, but it is not a violation of the Fifth Amendment. Being compelled to produce a document by subpoena ducès tecum—even a highly personal and incriminating document that you composed yourself—is not what is meant by being compelled to be a witness against yourself.

What drew my attention to the Hubbell decision was the fact that my clear understanding of the Fisher doctrine is exactly what was rejected by the Supreme Court, and by the nearly unanimous vote of 8-1. It is a small comfort to know that the Chief Justice (and he alone) thought that Judge Williams had it just right. What is at stake here is an obscure—if not exotic—extension of the Fifth Amendment right not to be compelled to assist in one's own conviction, with implications for the immunity doctrine, and substantial impact on the government's use of the subpoena to explore the documentary byways that may lead to criminal charges. A bit of background may be useful.

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4 I put "privilege" in quotation marks because, as an evidence teacher, I regard the word as juro-slang when applied to the Fifth Amendment shield. To my lights, this clause of the Fifth Amendment accords a right not to be compelled to incriminate oneself, not a "privilege." Immunity, substituted for the lost right, might be designated a privilege. So too we might regard the effects of an exclusionary remedy as a privilege in disguise. But the exalted precept of the Amendment itself establishes a right. The case that established the "testimonial or communicative evidence" boundary of the Fifth Amendment right was Schmerber v. California, 384 U.S. 757, 761 (1966), as discussed below.


6 To appreciate just how esoteric this doctrine is, understand that, since the Fifth Amendment "privilege" is "personal," collective entities (such as corporations) have no recourse to the claim that compliance with a subpoena is implicitly inculpatory. See generally United States v. Braswell, 487 U.S. 99 (1988).

7 Chief Justice Rehnquist dissented wholly on the basis of the dissenting opinion of Judge Williams in the court below. Hubbell, 530 U.S. at 44.
It was, of all people, Justice William Brennan who articulated the principle by which severe boundaries have been drawn on the Fifth Amendment doctrine of compelled self-incrimination. Back in 1966, ten years before Fisher was decided, Brennan announced in Schmerber v. California that the Fifth Amendment "privilege" meant that one could not be compelled to be a "witness" against oneself only in the sense of providing, under duress, "testimonial or communicative evidence." He quoted Justice Holmes, who rejected a Fifth Amendment objection to forcing a person to model a blouse.

In the quotation chosen by Justice Brennan, Holmes said the theory of the objection called for "an extravagant extension of the Fifth Amendment," and went on to say "[T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." In other words, as Brennan described the "privilege," no one can be forced to divulge cerebral evidence, to speak the contents and products of the mind. Here's how Justice Brennan expressed the principle in Schmerber:

[T]he privilege has never been given the full scope which the values it helps to protect suggest. History and a long line of authorities in lower courts have consistently limited its protection to situations in which the State seeks to submerge those values by obtaining the evidence against an accused through "the cruel, simple expedient of compelling it from his own mouth." . . . [T]he privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

From this emphasis on evidence pried from the clamped jaws of a potential defendant, one might have thought that the production of a previously-made document under compulsion of court order (though its contents be autobiographical and its

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9 Id. at 761.
10 Id. at 763 (quoting Holmes' opinion in Holt v. United States, 218 U.S. 245, 252-53 (1910)).
11 Schmerber, 384 U.S. at 763. In a rather neat phrase (though baffling to some), Holmes once put it this way: "A party is privileged [by the Fifth Amendment] from producing the evidence but not from its production." Johnson v. United States, 228 U.S. 457, 458 (1913).
12 Schmerber, 384 U.S. at 762-64.
import be inculpatory is of no concern to the Fifth Amendment. Like any other physical evidence, the document may be produced by compulsion so long as it was not created by compulsion. But it should be remembered that the evidence at issue in Schmerber was blood, forcibly extracted for chemical analysis of alcohol content. It was not a document, and Brennan was careful to note that while, as Holmes had held before him, the Fifth Amendment "privilege" does not protect the body or its fluids, it may apply to past and recorded expressions of the mind. Thus, he wrote (with one of those exasperating claims to clarity): "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers."

Brennan's initial exemption for written communications (not compelled communications when made, but surrendered under compulsion of subpoena) made sense. Indeed, there are some, including the concurring Justices in Hubbell, to whom it still makes sense. A priori, and ignorant or dismissive of contrary judicial precedent, one might easily be tempted (along with my students) to believe that being compelled (by court process or otherwise) to furnish previously-expressed cerebral evidence that might be used in securing a conviction violates the explicit terms of the Fifth Amendment: not to be compelled to be a witness against oneself.

But Justice Brennan did not rely on intuition. He had respected authority for his inclusion of recorded declarations in the category of testimonial evidence compelled from the witness' own mouth. He relied exclusively on an old and venerable case called Boyd v. United States. That case, decided in 1886,

\[\text{Id. at 759.}\]
\[\text{Id. at 763.}\]
\[\text{Id. at 763-64 (citing Boyd v. United States, 116 U.S. 616 (1886)).}\]
\[\text{In a rather startling concurring opinion, Justice Thomas, with Justice Scalia, expressed his opinion that the Schmerber construction of the scope of the Fifth Amendment protection fails to accord with the historical record. See Hubbell, 530 U.S. at 49 (Thomas, J. and Scalia, J., concurring). A bit more on this opinion anon.}\]
\[\text{Boyd, 116 U.S. 616. Boyd was not the first case in which the Supreme Court dealt with the compelled rendition of self-incriminating documents. Professor Nagareda reminds us of a dictum written over fifty years before Boyd in which the Court said that a witness "could not have been compelled to produce the commission [the sub-}
held that the Fifth Amendment "privilege" and the rights to security under the Fourth Amendment overlapped, such that invasions of privacy might at the same time amount to compulsory self-incrimination. In one of its most frequently quoted passages, the Court in *Boyd* wrote: "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

Brennan's allocation of the Fifth Amendment "privilege" to the realm of "testimonial and communicative" evidence has endured; his *Boyd* exception has not. *Boyd* itself was shot down more than once, only to rise again like a Phoenix. However, unless *Hubbell* has stirred new life in the creature, several cases have corrected Brennan's initial take on the status of freely recorded verbal evidence. And today, or until *Hubbell*, I think most commentators would be willing to say unequivocally (with Justice Sandra Day O'Connor) that documents are more like body fluids or the keys to the padlock than they are like live testimony or the padlock's memorized digital code. Perhaps the

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*Boyd*, 116 U.S. at 633. Perhaps the strongest statement of this overlap is the following:

We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.

*Id.*

How can one resist calling a case named *Boyd* a Phoenix when it rises from its own ashes?

*See supra* notes 63-69 and accompanying text.

factual backdrop of the Hubbell drama should be painted in at this point to set the scene. Then I will attempt to flesh out these esoteric doctrines to see whether the Court has distorted the fragile distinction or incurred any pragmatic grief.

In the fall of 1994, Kenneth Starr, the Independent Counsel (IC hereafter), was investigating the financial affairs of the Whitewater Development Corporation, and more particularly the possible involvement of President Clinton therein. Out of this investigation came an indictment against presidential friend, Webster Hubbell, for mail fraud and tax evasion arising out of the billings of his Arkansas law firm. In December 1994 he pleaded guilty and received a sentence of twenty-one months. As part of the plea agreement, Hubbell undertook to cooperate in the Whitewater investigation. In October 1996, while Hubbell was doing his time, the IC served him with a subpoena calling for the production of documents in eleven categories before the Little Rock grand jury. When Hubbell appeared before the grand jury the following month, he asserted his privilege against self-incrimination. He did not assert the privilege because the contents of the documents might be inculpatory, but rather on the contention that the act of compliance with the subpoena itself might have adverse penal consequences. He also refused on the same ground to answer questions about whether he had documents answering the description in the subpoena within his custody or control.

The government, prepared for this move, immediately produced a previously obtained court order directing a response, and granting such immunity as allowed by law. Hubbell thereupon produced over 13,000 pages of documents, and responded to questions to the effect that these were all the documents in his possession answering the subpoena's description, save a few exempted by attorney-client privilege. The contents of these documents furnished material that enabled the IC to bring a second prosecution, the case under discussion here. This indictment charged various tax-related mail and wire frauds in ten counts. The District Court dismissed it on the

over incriminating words or things already in existence" and "obliging him to be a witness").

25 We don't have the cooperation agreement, but it seems a bit odd at the outset that the government had to proceed by subpoena and tolerate a motion to quash when the usual arrangement with a cooperating witness is simply to put the obligation of full disclosure in the contract itself.
ground that it violated the statutory immunity granted Hubbell because all the evidence either "directly or indirectly derived from" the testimonial aspects of respondent's "immunized act" of producing those documents. 24 Terming the subpoenas "the quintessential fishing expedition," Judge Robertson noted that the IC had admitted that he had no interest in tax matters when he issued the subpoena, but had learned about the unreported income from reading the records produced. 25

The Court of Appeals vacated the order of dismissal and sent the case back to the District Court. The minuscule difference of opinion comes to this: the District Court (according to the Court of Appeals) had emphasized the prior ignorance of the IC regarding the contents of the documents, rather than their existence and authenticity or the respondent's possession and control of them. The IC would have learned of these matters from their production alone. If the Court of Appeals accurately read Judge Robertson's order, 26 this result seems the correct application of Fisher. On remand, however, the District Court was directed to determine "the extent and detail of the government's knowledge of Hubbell's financial affairs (or of the paperwork documenting it) on the day the subpoena issued." 27 This, they said, would reveal the extent that the government made use of the act of production in "building its case."

Apart from its impossibly fine distinction between the contents and the existence of documents, the position of the majority of the Court of Appeals seems simply wrong. As I shall attempt to explain more fully below, the existence of the papers as a fact standing alone was of no significance; it's no crime to write or keep financial records. Nor was the custody or authen-

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24 United States v. Hubbell, 11 F. Supp. 2d 25, 34, 36 (D.D.C. 1998), rev'd 167 F.3d 552 (D.C. Cir. 1999), aff'd 120 S. Ct. 2037 (2000). The court also dismissed on the ground that "The charges in the indictment neither relate to nor arise out of the subject of the original grant of jurisdiction to the independent counsel, and the referral order under which the independent counsel is proceeding impermissibly expands that jurisdiction." Id. at 27. That basis for dismissal, however, was reversed and evidently dropped; it was not before the Supreme Court.

25 Id. at 37.

26 The district court opinion is not crystal clear on this point. Judge Robertson writes: "The independent counsel concedes that he built his case against Mr. Hubbell using 13,120 pages of records that Mr. Hubbell was compelled to produce under subpoena." Id. at 27 (emphasis added).

ticity of the documents the issue; this was not a crime of possession, nor was Hubbell’s compliance with the subpoena likely to be evidence of provenance or of Hubbell’s knowledge of or involvement in the tax fraud. Hence, it must have been the contents of the manna from heaven that enlightened the IC and propelled the investigation to the point of indictment. The question of how much the IC knew before he saw the papers (or, as the court puts it, before he issued the subpoena) is the same question as how much he learned about this matter from what he read in the papers—their contents. The question on remand, then, will result in the same answer as the question deemed error the first time around.28

On remand, the IC conceded that he could not demonstrate, as the Court of Appeals demanded, “a prior awareness that the exhaustive litany of documents sought in the subpoena existed and were in Hubbell’s possession.”29 Hubbell thereupon entered a conditional plea of guilty subject to the Supreme Court’s view of the reach of the immunity. The Supreme Court obligingly granted the IC’s petition for certiorari.30

Affirming the Court of Appeals, Justice Stevens, for the majority of the Supreme Court, obviously accepts the government’s dual arguments: (1) that only the existence, authenticity, and custody of the documents are attested by compliance with the subpoena duces tecum; and (2) that the government does not propose to use the fact of compliance directly to prove any of

28 The dispositive question as framed by the court would not have pleased the Editors of the Harvard Law Review who wrote, in 1982, “the extent to which mere production conveys information is not altered by the depth of the government’s [prior] knowledge.” Note, The Rights of Criminal Defendants and the Subpoena Duces Tecum: the Aftermath of Fisher v. United States, 95 HARV. L. REV. 683, 687 (1982). It’s a point worth pondering. The locus of the “privilege” does not generally depend upon the extent to which its violation advances the government’s cause. The introduction of a coerced confession (or illegally seized evidence, for that matter) is as repugnant in an otherwise overwhelming case as in a weak one.

29 Hubbell, 167 F.3d at 581.

30 The “plea agreement” actually provided for dismissal of all charges against Hubbell unless the Supreme Court held that the act-of-production immunity “would not pose a significant bar to his prosecution.” United States v. Hubbell, 120 S. Ct. 2037, 2038 (2000). Whether, in an “ordinary case,” the Supreme Court would have deigned to answer the question put to them by the plea agreement—indeed, whether the Solicitor General would have put the question to them—is subject to doubt. In any event, the Court found that the case is not moot since a reversal with an opinion sufficiently favorable to the government will result in a sentence (not involving incarceration). See id. at 2046-48.
those facts. Yet the Court finds that indirect use was “abun-
dantly clear,” supplying a “lead to incriminating evidence,” a
“link in the chain of evidence needed to prosecute.” Such use
would violate the immunity accorded to the full extent required
by law since immunity adequate to overcome the Fifth Amend-
ment “privilege” must include insulation of the products of the
compelled evidence. That much has been clear since the an-
cient case of Counselman v. Hitchcock, which first accepted im-
munity as a constitutionally adequate replacement for the lost
“privilege,” specifically on condition that future use of the indi-
rect products of compelled testimony be precluded.

So the question in Hubbell becomes, just how did the gov-
ernment use the inferences from the act of compliance indi-
rectly? Such indirect use is not inconceivable. What if an
Assistant U.S. Attorney approached a reluctant witness and per-
suaded him to give evidence by telling him, “When we asked for
them, Web brought in 13,000 pages of documents from his files;
how can you say he knew nothing about these matters?” The re-
sponse, offered as evidence against Hubbell, would surely be
excluded as fruit. Not having exhibited the documents or told
the potential witness what they contained, it could not be said
that the prosecutor procured the secondary evidence by use of
the contents of the primary; it was obtained by exploitation of
the privileged act of production.

But that sort of clear, derivative use was not the present sce-

cnario. Where, then, did Justice Stevens and company find the
clearly established, secondary gain from the Fisher-type self-

inculpation? Stevens emphasizes the “undeniable” value to the
government of the “catalog of existing documents fitting within

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51 Id. at 2046.
52 142 U.S. 547 (1892).
53 This was also the decision that was universally misread for eighty years to require
“transactional” immunity (true immunity against future prosecution) until the nation
was set straight by Kastigar v. United States, 406 U.S. 441 (1972).
54 I assume, of course, that the response inculpating Hubbell, either repeated
from the witness stand or otherwise exempt from the rule against hearsay, was other-
wise admissible.
55 The purist might note here that it is somewhat odd for the Supreme Court to
make findings such as these. What the government knew, how they learned it, and
whether and to what extent the cataloging provided by Mr. Hubbell was of assistance
in preparing his prosecution, are normally the sort of factual determinations that are
made by trial judges upon remand.
any of the eleven broadly worded subpoena categories.\textsuperscript{36} The "accurate inventory" of potential sources of incriminating evidence landed on the prosecutor's desk through the cerebral efforts of the defendant, Hubbell.\textsuperscript{37} Furnishing this rich lode of pre-sorted tips, the Court reasoned, was like answering a series of detailed interrogatories utilizing the "contents of his own mind."\textsuperscript{38} "The assembly of those documents," the Court believed, "was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox."\textsuperscript{39}

The problem with this reasoning is that it goes too far. Virtually every custodian who complies with a subpoena \textit{duces tecum}, must use his or her mind to sort out the files and to cull and organize documents. The process of recognition and the implicit voucher of authenticity—attesting, in effect, that these are the items answering the description in the subpoena—are, of course, the predicates of \textit{Fisher}. But \textit{Fisher} precludes only the use of the inculpatory inference itself (here displaced by the immunity). The facilitation of understanding from an organized catalogue, like the discovery of the substantive crimes from the facts recorded in the documents, is not really a secondary gain from the compelled act of production; it is simply drawing inferences from contents. It hardly seems "anemic"\textsuperscript{40} to argue that \textit{Fisher} forbids the use of inferences from the "physical act" of production only, and not from the contents of the items produced.\textsuperscript{41}

The majority calls a prohibited secondary gain the receipt of "the incriminating documents of which it made 'substantial use . . . in the investigation that led to the indictment."\textsuperscript{42} Here and elsewhere, Stevens appears to say that the derivative use that violated Hubbell's immunity consisted of the intelligence the documents contributed to the development of the case against

\textsuperscript{36} United States v. Hubbell, 120 S. Ct. 2037, 2046 (2000).
\textsuperscript{37} Id. at 2047. It should be noted that, except for the intolerable burden and disruption alluded to as Fourth Amendment grounds for quashing a \textit{duces tecum} subpoena, the effort required to cull and sort records has never been a factor in weighing the constitutionality of enforced compliance.
\textsuperscript{38} Id. (citations omitted)
\textsuperscript{39} Id.
\textsuperscript{40} Id. (Justice Stevens' characterization).
\textsuperscript{41} Id.
\textsuperscript{42} Id. (quoting Brief for the United States at 3, United States v. Hubbell, 120 S. Ct. 2037 (2000) (No. 99-166)).
Hubbell. Let us hope that he does not mean that having seen the neatly organized reams of documentary evidence of defalcation, the IC was more than ever determined to make the second case against Webster Hubbell. Derivative use cannot include the subjective impact on the prosecutor of the documents produced. The confirmation of suspicion and the enhancement of motivation are the normal byproducts of even the most securely immunized compliance with any subpoena.  

In any event, the Court's description of the prohibited "derivative use" comes perilously close to treating the contents of a document as the indirect product of its production. And this approach confuses Fourth and Fifth Amendment rights and hints at a rebirth of the thoroughly discredited and deeply interred Boyd doctrine. This poses a nice dilemma between unthinkables: either the Fifth Amendment "privilege" forbids compelling self-incrimination by the compulsory surrender of inculpatory evidence (or at least documents), or the "privilege," which insulates direct use of the implicitly inculpatory aspects of the fact-of-production, offers no protection against the use of its indirect products, in defiance of Counselman v. Hitchcock.

The only way to avoid the grim doctrinal consequence of applying the right against compelled self-incrimination to the inculpatory contents of subpoenaed documents is twofold. First, the Counselman injunction must be modified in this application to make it clear that the only secondary gains prohibited by Fisher are those procured by the express use of the fact of compliance alone—without reference to the contents, their ordered presentation, or their surprising import—much as in the simple paradigm I offered a while back. Then we might deal with the intuitive offensiveness of wanton probes—the quintessential fishing parties—by beefing up the Fourth Amendment. The privacy concerns implicit in the security of "papers," to which that Amendment is addressed, suit it admirably for the task. All that is required is for the Court to declare that private records have unique features of sanctity such that a search for them by subpoena is unreasonable per se. They must be

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43 To be sure, the grand old classic, Silverthorne Lumber Company, Inc. v. United States, 251 U.S. 385 (1920), on its own terms, appears to hold that the fruit of the poisonous tree includes the effect that illegally-obtained documents has on the purposes of the prosecutor. But in the voluminous citations to that case as the progenitor of the "fruit doctrine," it is probably safe to say that no court has read the decision literally.
sought, if at all, by warrant. That means the defendant must show some advance probable cause that they exist and that they are in the location specified. Moreover, they must be described with some particularity, though there is precedent for treating this requirement liberally.44

There is one example I can think of where the Court has actually taken a category of seizure out of the reasonableness clause and insisted it could be lawfully made only in obedience to the warrant clause. This is the seizure of a person by arrest. In Payton v. New York the Court noted that although one's security in his person did not preclude a seizure on probable cause (or, in some circumstances, a temporary detention on less65) without a warrant in open spaces. However, the Court stated that when a person goes into his home, that security interest is amplified by the specially-sanctified privacy interests of the enclosure.66 Thus, the Court held an indoor arrest (and certainly an at-home arrest), even on ample cause, is unreasonable without an arrest warrant (the equivalent of a search and seizure warrant for a live body).67

Actually, Payton lays down a serviceable footprint in the virgin snow. Some acquisitions are so grievously destructive of firmly-held notions of individual integrity that ordinary considerations of reasonableness will not suffice. This is especially true when reasonableness standards are as loosely relaxed as they are in the case of a search by subpoena. Imposing the requirements of prior description and probable cause comes closer to answering the concerns of the Hubbell Court than unpersuasive applications of the doctrine of secondary gains from implicit compelled self-incrimination.

The suggestion that searches for and seizures of certain "private" or "personal" papers be shifted into the warrant clause of the Fourth Amendment will cause no undue alarm in many prosecution investigations. It is axiomatic that we don't normally seek inculpatory documents by subpoena duces tecum. Charging the fox with the responsibility of delivering the chickens, feathers intact, to the grand jury does not seem the wisest course. But considerable consternation can be expected from

44 See, e.g., Camara v. Municipal Court, 387 U.S. 523 (1967).
47 Id. at 590, 603.
those prosecutors engaged in the typical broad-ranging, open-ended exploratory investigation.

The point to be emphasized is, of course, that—until now—there has been nothing wrong with prosecutorial expeditions that fish for evidence of crime with subpoenas *duces tecum*. Indeed, prosecutors—and the grand juries they lead—are supposed to go fishing. They are supposed to enlighten themselves by the product of their subpoenas. There is no requirement that they know what they will get before they ask for it. However, there is a strict constitutional requirement that they know exactly what they are looking for before they go into private space by warrant to look for it. But the subpoena rules differ in precisely that regard. While the *duces tecum* is a Fourth Amendment event, the requirement of an advance, particular description is relaxed considerably. The only constitutional limitation on the search by subpoena is that it not be hopelessly broad or severely burdensome. If compliance would require the production of virtually all the records of a business, or if the burden of sorting through the records would nearly bring the ordinary operation of the business to a halt, the subpoena is invalid. Maybe the confusion is in the use of the metaphor “fishing expedition.” The term is used to characterize the vague or over-inclusive subpoena, but it is defined as I have just done. It is not defined as the District Court did in *Hubbell*, as a subpoena calling for documents the contents of which reveal the unsuspected details of the custodian’s crimes.

Now, it might be that the *Hubbell* subpoena was overbroad in its description of the documents in the eleven categories, or that it would have been unduly burdensome for Hubbell to comply (particularly from his prison cell), but there seems to have been no claim on those grounds; Hubbell had the thirteen thousand pages ready to hand over when immunity was accorded him.

While the Chief Justice’s dissent relies entirely on the dissenting opinion of Judge Williams in the Court of Appeals, Justice Thomas, with Justice Scalia concurring, signal their willingness to reconsider Brennan’s circumscription of the ambit of the Fifth Amendment “privilege.” They detect a “substantial body of evidence” that would extend the coverage of the privilege to potentially inculpating “evidence” of all sorts, not just “testimony.” Nor do they propose to revise only the post-*Schmerber* error. They contend that the historical record would
extend the privilege not only to recorded products of the mind, but the compelled production of any evidence. The "witness" in the true constitutional sense of the word is "one who gives evidence"—evidence of any kind. The support Thomas and Scalia cite for their proposition is found in dictionaries and judicial opinions of the late eighteenth and early nineteenth centuries. Moreover, they say, the eighteenth century common-law privilege against self-incrimination protected against compelled production of physical and documentary evidence of all sorts. With a long, scholarly exegesis on the original meaning of the "privilege," they issue a warm invitation to the bar to afford the Court a future opportunity to remake some basic constitutional doctrine—with devastating effect.

This highly unusual preview of the disposition of two Justices, addressed to an abstract question, may be historically sound and logically persuasive, but it is difficult to imagine that these two venturesome Justices can convince at least three colleagues to overrule Schmerber and find that the painless extraction of blood (or breath, for that matter) from an unwilling driver to test for alcohol content, or the direction to don a critical garment, is forbidden by the Fifth Amendment. Even the proposition that a subpoena summoning inculpatory private papers, freely made, makes the messenger into a "witness" is a hard sell at this juncture in our doctrinal development.


49 Professor Nagareda, whom Justice Thomas cites, advances a similar line of argument. He contends that in contemporary eighteenth century usage "to be a witness" was interchangeable with "to give evidence." Moreover, undisputed common law at the time of the founding forbade the compelled production of self-incriminatory documents. See Nagareda, supra note 17, at 1615-24. Although he does not dispute the Court's correction of Justice Bradley's misunderstanding of the Fourth Amendment to forbid as "unreasonable" the seizure of self-inculpatory documents, he does accuse the Court of having "thrown out the Fifth Amendment baby with the Fourth Amendment bath water." Id. at 1581. Specifically, he commends to the Court the view that "compelled production of self-incriminatory documents independently violates the Fifth Amendment, even though the seizure thereof would be permissible under the Fourth." Id.

50 This is the very task that Professor Nagareda has taken on himself. Rejecting Fisher's logic, he argues "[t]he fundamental distinction is between the compelled giving of self-incriminating evidence to the government (categorically impermissible under the Fifth Amendment) and the unilateral taking of such evidence by the government (permissible, when done in compliance with the Fourth)." Id. at 1581. While this restructuring might have the advantage of forcing a higher degree of ad-
Fisher, on which the Hubbell Court relies, was explicit on the ways in which compliance with a subpoena ducès tecum might implicitly communicate a fact that could be used against the responding custodian. Justice Byron White, writing for the Court, set forth just how the act of production might itself be incriminating testimony. He wrote:

The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer’s belief that the papers are those described in the subpoena. [Citation omitted.] The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both “testimonial” and “incriminating” for purposes of applying the Fifth Amendment. These 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. In light of the records now before us, we are confident that however incriminating the contents of the accountant’s workpapers might be, the act of producing them—the only thing which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination. It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment.

Professor Heidt fairly notes that the Court, in expounding its implied admission rule in the subpoena context ignores other situations where compelled compliance with law carries a self-inculpatory implication. For one (as Justice White acknowledged), providing a handwriting exemplar implicitly communicates that the person can write and that the writing is his normal script. For another, Heidt cites United States v. Byers, 402 US 424 (1967), upholding a California statute requiring a person involved in an automobile accident to give his name and address at the scene. See generally, Robert Heidt, The Fifth Amendment Privilege and Documents: Cutting Fisher’s Tangled Line, 49 Mo. L. Rev. 439 (1984).

So Justice White took pains, in creating this extension of the privilege, to specify—and thereby to limit—its application. He conceived of three, and only three, ways that the act of compliance might itself be testimonially incriminating: attesting to the existence of the papers called for, the fact that the person subpoenaed has them, and that they are, in the belief of the person subpoenaed, the very papers described in the subpoena. He goes on to note (1) that however incriminating the contents, their compelled production does not trouble the Fifth Amendment; and (2) that it is doubtful that merely admitting the existence and possession of the documents rises to testimonial self-incrimination.53

In my view, therefore, the words of the Court that created the act-of-production privilege attaching to the subpoena duces tecum are very close to the words of dissent by Judge Williams of the Court of Appeals for the District of Columbia Circuit, adopted by Chief Justice Rehnquist in dissent. Any use of the subpoenaed documents breezes by the Fifth Amendment "privilege," save only the use of the fact of compliance itself as proof of guilt. There is no suggestion whatever in Hubbell that the Court believed that such use would be made, nor did they remand (or approve of the remand) to discover whether such use was contemplated. Rather, the Court, and the court below, wanted to know whether the prosecutor learned anything that he didn't know before from reading the subpoenaed documents. If so, then impermissible derivative use, in contravention of the immunity granted, was made of the subpoenaed documents. To me, this seems plain wrong.

Another way to look at the issue in Hubbell is in terms of immunity: Was the prosecution (the second prosecution) of Webster Hubbell precluded by the immunity granted him in exchange for the thirteen thousand pages he turned over? The extent of the immunity, remember, was coyly stated as whatever he is entitled to by law. This timid phraseology is the government's raft out of a turbulent part of the river, but it is also a way of informing the target-witness that he will receive only the minimal statutory protection rather than the more generous contractual immunity which the government reserves for its most important (and reluctant) cooperators. The government can—and regularly does—enter written agreements with flipped

defendants by which the government agrees, and binds itself, to drop pending charges or to forego prosecution in exchange for truthful assistance. This is old-fashioned "transactional," or "true," immunity. But it is more than the government need offer to strip the imperiled target of his asserted constitutional protection against incriminating himself. In *Kastigar v United States*, the Supreme Court corrected a longstanding misapprehension in state and federal courts: to override an assertion of "privilege," all that is necessary is a replacement for the lost protection, and that is adequately provided by a guarantee that the truthful, compelled evidence will not be used directly or as the source for other evidence in a future prosecution of the person who surrenders it. This is so-called "use immunity." Shortly after this intelligence came down, the federal government and most states trimmed back their immunity statutes to grant use rather than transactional immunity. Thus, the immunity law involved in *Hubbell*, 18 U.S.C. section 6002, provides that whenever a witness asserting the "privilege" is ordered to respond, the witness must do so, but "no testimony of other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

One critical caveat is missing from this simple paradigm. The reluctant witness cannot withhold merely damaging or embarrassing testimony by "taking the Fifth"; only the potentially incriminatory may be withheld. And the command that overcomes the "privilege" confers immunity only to the extent that the disclosed information was within the entitlement of silence in the first place. On this point, section 6002 is not as clear as it might be, stating that: "Whenever a witness refuses, on the basis of the privilege against self-incrimination . . ." This seems to imply that immunity is in the hands of the witness; all she need do is assert the constitutional basis for her refusal and whatever she is ordered to reveal is outside the government's reach thereafter. Not so. Immunity covers only what the "privilege" covered. The assertion of the "privilege" that triggers the immunity must be a valid assertion, that is, the answer to the ques-

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54 406 U.S. 441 (1972).
tion might actually incriminate or furnish a lead to something incriminating. So the immunity question becomes indistinguishable from the rights question: did the prosecutor “use” the material which Hubbell was constitutionally entitled to withhold?

As I have said, I think not. The “use” that the Court finds “abundantly clear” (rendering remand unnecessary) was the new understanding that the IC gleaned from the neatly catalogued papers that was helpful in developing the case against Hubbell. These are, of necessity, matters contained in the papers, not the fact of their production. And the contents of a writing, not itself produced by coercion, are without the protection of the Fifth Amendment. No “privilege,” no immunity. Since Webster Hubbell was not entitled to withhold the information contained in the papers, he was not immune to the use against him of those contents, insofar as they informed the IC of what he did not know independently.

Of the several perplexing—and disturbing—features of this strange opinion, two stand out. The first is the murky suggestion that the Phoenix, Boyd v. United States, may be rising again from the ashes of its many burials. The other is the implication, unnoticed by the Court (none of whom ever investigated or tried a criminal case), for the future use of investigative subpoenas in the development of subterranean cases of fraud, corruption, or financial mismanagement.

Undeniably (as I have noted), there is something appealing about Justice Bradley’s thesis in the Boyd case, even today, to many people aside from Justices Douglas, Brennan, and Marshall. We do sympathize, viscerally, with the idea that private records and papers should not be subject to invasion by warrant or compulsory process in the same way that other physical evidence is. Whether this exemption be called an area of per-

56 Before the overriding order that penetrates the “privilege” and confers the immunity is issued, the witness’ refusal may be taken before a judge for a ruling on the validity of the assertion.

57 See, e.g., Nagareda, supra note 17 (concluding that the proper treatment of subpoenas “requires one to abandon the reasoning of Fisher and to resurrect the Fifth Amendment holding of Boyd.”) See also Robert S. Gerstein, The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court, 27 UCLA L. REV. 343 (1979).

58 Even Warden v. Hayden, 387 U.S. 294, 300-01 (1967), which eliminated the exemption for “mere evidence,” noted that a subpoena to fetch “private papers” was invalid.
sonal security immune even to the Fourth Amendment warrant process, or a special variety of compelled self-incrimination which offends the Fifth Amendment "privilege," seems a matter of little moment. Obedient to this instinct, the Boyd Court comes to its "overlap" doctrine and the notion that protected privacy is violated by the compelled production of one's own words, albeit in recorded form. Reminding the Bar of Lord Camden's 1762 judgment in the famous case of Entick v Carrington, Justice Bradley issues this much-quoted aphorism:

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence [to liberty and security]; but it is the invasion of the indefeasible right of personal security, personal liberty, and private property. . . . In this regard the fourth and fifth amendments run almost into each other.\(^59\)

Justice Bradley also adverts to a law passed by the First Congress in 1789 providing that courts shall have the power to compel the production of books and records containing evidence, but only subject to the rules of chancery. One "elementary" feature of those rules, Justice Bradley informs us, "is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property."\(^60\)

So the attraction of Boyd seems to be this: Self-inculpatory words spoken under compulsion, which emanates either from interrogation or the process of the subpoena \textit{ad testificandum}, do not seem intuitively so different from words spoken or written freely but produced under compulsion of the subpoena \textit{duces tecum}. And Justice Thomas and his co-signor have promised, with a rich foretaste, to fortify that intuition with solid scholarship.

But despite the pull of this century-old case, it has not set the course for navigating between the principles of the Fourth and the Fifth Amendments. The Boyd Court's inability to distinguish the invasion of privacy by unlawful search and seizure from the compelled disclosure of inculpatory facts ultimately doomed the case. Security in person and place has nothing whatever to do with freedom from government coercion. The search warrant allowed by the Fourth Amendment is, by its nature, coercive. It authorizes a coercive (in the sense of non-consensual) invasion of secure places. And what may be law-

\(^{59}\) Boyd v. United States, 116 U.S. 616, 630 (1885).
\(^{60}\) Id. at 631.
fully-seized includes papers along with other incriminating material. On the other hand, the area protected by the Fifth Amendment right cannot be penetrated by process, however strong the probable cause or particular the description; the cognitive process can only be penetrated by the substitution of fully compensatory immunity. So, prevalent thinking would have it that the two Amendments do not "run almost into each other." They diverge sharply to protect in different ways two very different aspects of personal security and autonomy. And in that distinction, the difference is clear between the personal paper protected by the Fourth Amendment, not against forced surrender, but against arbitrary invasion of its locus and baseless deprivation of its corpus, and, in contrast, the mind of the suspect protected by the Fifth against any form of curtailment of volitional control.

Perhaps the coup de grace was delivered to the old Boyd doctrine by Justice O'Connor, concurring in United States v. Doe,\(^6^3\) where she wrote:

>I concur in both the result and the reasoning of Justice Powell's opinion for the Court. I write separately, however, just to make explicit what is implicit in the analysis of that opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind. The notion that the Fifth Amendment protects the privacy of papers originated in Boyd v. United States, but our decision in Fisher v. United States sounded the death knell for Boyd. "Several of Boyd's express or implicit declarations [had] not stood the test of time[,]" and its privacy of papers concept "had long been a rule searching for a rationale . . . ." Today's decision puts a long-overdue end to that fruitless search.\(^6^2\)

But, as Justice O'Connor notes, it was Fisher, assisted by a case called Andresen v Maryland,\(^6^3\) both decided in 1976, that definitively brought the reign of Boyd to a close.\(^6^4\) In Andresen, Justice Blackmun squarely presented the question as follows: "The question, therefore, is whether the seizure of these business re-

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\(^{6^2}\) Id. The Editors of the Harvard Law Review had so concluded two years earlier. They wrote: "Because no more compulsion is involved in producing personal papers than in producing other evidence, the self-incrimination clause can no longer be used to exclude private papers from production." Note, The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States, 95 HARV. L. REV. 683 (1982).

\(^{6^3}\) 427 U.S. 463 (1976).

\(^{6^4}\) See also Braswell v. United States, 487 U.S. 99 (1988).
cords, and their admission into evidence at his trial, compelled petitioner to testify against himself in violation of the Fifth Amendment. To support an affirmative answer, petitioner relied on the language of *Boyd* just quoted. Blackmun and the rest of the Court simply were not persuaded. They looked back only a few months to *Fisher v. United States*, and quoted their own authority as follows:

[A]n attorney’s production, pursuant to a lawful summons, of his client’s tax records in his hands did not violate the Fifth Amendment privilege of the taxpayer “because enforcement against a taxpayer’s lawyer would not ‘compel’ the taxpayer to do anything—and certainly would not compel him to be a ‘witness’ against himself.”

Andresen, to be sure, laid a strange emphasis on the fact that the acquisition of evidence had been by search, compelling the defendant to do nothing, much less to say something incriminating. That unfortunate and repeated point invites the distinction between search (a passive endurance) and subpoena (compelled active cooperation). Of course, all the Court was trying to do was to recognize its own recently created doctrine, and allow that with a subpoena, unlike a warrant, there is a possibility the at the act of compliance may be, in itself, communicative. But one should avoid the temptation to say that though *Boyd* may be dead for acquisitions by warrant, it lives where the *duces tecum* compels production.

In 1984 the Supreme Court handed down a John Doe case devoted exclusively to the Fifth Amendment aspect of a subpoena *duces tecum* for documents. With copious quotations from *Fisher*, Justice Powell wrote for the Court,

As we noted in *Fisher*, the Fifth Amendment protects the person asserting the privilege only from compelled self-incrimination [citing *Fisher*]. Where the preparation of business records is voluntary, no compulsion is present. A subpoena that demands production of documents does not compel oral testimony; nor would it ordinarily compel the tax-

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65 *Andresen*, 427 U.S. at 471.
66 He also relied on Hale v. Henkel, 201 U.S. 43 (1906), a case nearly as famous as *Boyd*, which I need not discuss here.
67 *Andresen*, 427 U.S. at 472.
69 *Id.* at 607, n.3. The court made this point because they evidently saw a possible Fourth Amendment problem with the subpoenas which were very broadly drawn. They noted that that issue, however, was not before them.
payer to recite, repeat, or affirm the truth of the contents of the document sought' [citing Fisher again].

So, disagreeing with the Court of Appeals (and making a point of the disagreement), the Court finds: "The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged." On the issue of the act of compliance, the Court apparently reluctantly accepts the District Court finding that the act of producing the documents would involve implicit testimonial self-incrimination as a matter of fact. They unwisely decline to allow de facto immunity, and note that the government never pursued the statutory course for bestowing immunity. However, they could have done so. The Court is careful to note that had they done so, "the Government . . . could have compelled respondent to produce the documents listed in the subpoena.

The message is clear: there was no significance in the apparent stress the Court laid in Andresen on the fact that acquisition by search warrant compelled the defendant to do nothing; nor is the passivity of the defendant significant in cases like Fisher, where a subpoena duces tecum is addressed to third parties. The Fifth Amendment simply does not apply to acquisition of documents by subpoena except in those few instances in which the act of production has evidentiary value in itself. In such instances, the grant of formal immunity, as was done in Hubbell, completely overcomes any possible Fisher problems. And Boyd, of course, is totally out of the picture.

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70 Id. at 610 (citing Fisher v. United States, 425 U.S. 391 (1976)).
71 Id. at 617, n. 18.
72 Doe, 465 U.S. at 612. For nit pickers, the fact that the records were in respondent's possession might distinguish the case from Fisher, where the records were in the hands of a third party: the lawyer.
73 I think it unwise because, in the normal course, when constitutionally shielded communication is obtained without fully compensating immunity the evidence is unusable. Not called "use immunity," the exclusionary consequence is indistinguishable from it (possible civil remedies aside). So it could have been said that the prosecution simply bears the burden of showing that neither the implicit communication of compliance, nor any fruits thereof, were used as evidence. It's not the prosecutors propective promise that he will not, it is a demonstration that he hasn't, that removes the Fisher stain.
74 Doe, 465 U.S. at 614.
So, despite the many efforts to extinguish the Boyd doctrine, one of the disturbing characteristics about the Hubbell decision is that it sends a faint and subtle suggestion that the Phoenix may be stirring in her ashes yet again. The opinion comes close to saying outright that the contents of Hubbell’s documents were protected by immunity and hence by the Fifth Amendment against the IC’s use to enlighten himself. In other words, the telltale contents of the freely recorded documents, such as inculpatory testimony, can not be forcibly pried from the hands of its custodian. This reading of the Hubbell message, which is hopefully erroneous, implies a substantial doctrinal shift.

This troubling suggestion remains subtle, however, because Justice Stevens, writing for the Court, knows and readily recognizes the lesson of Fisher, Andresen, and Doe. Likewise, the majority obviously cannot be wooed by Thomas’ promise to reinvent the bounds of the “privilege” starting from scratch (i.e., before Schmerber). Thus, Stevens writes: “More relevant to this case is the settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not ‘compelled’ within the meaning of the privilege.” But the bottom line, as the Court sees it, is not “whether the response to the subpoena may be introduced into evidence at his criminal trial.” That would violate the immunity granted. Rather, the question is “whether [the Government] has already made ‘derivative use’ of the testimonial aspect of that act” in obtaining the indictment and preparing for trial. Clearly the Court finds it has. Specifically, “it is undeniable that providing a catalog of existing documents fitting within any of the eleven broadly worded subpoena categories could provide a prosecutor with a ‘lead to incriminating evidence’ or ‘a link in the chain of evidence needed to prosecute.’” “It is abundantly clear that the testimonial aspect of respondent’s act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution.”

The case, then, comes down to the extremely subtle, if not metaphysical, question of whether the information used by the

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76 Id. at 2046.
77 Id. at 2039.
78 Id. at 2046.
IC, the “catalog,” was the unprivileged contents or the privileged contents of the mind of Webster Hubbell, revealed in his act of compliance. Is the government’s contention that all that Hubbell did was physically and non-testimonial furnish the documents truly “anemic” as the Court would have it? Or is the Court’s view correct that by turning over hundreds of documents, and implicitly attesting to their character, Hubbell lent his testimony to the IC’s development of the case against him, such that the prosecution itself was “derived” from the compelled act of production?

It is my concern that looking to the understanding, factual enrichment, or motivation of the prosecutor as the product of a witness’ act of compliance with a subpoena calling for documents will take us far beyond Fisher’s modest application of the “privilege” to the delivery of physical evidence. If claiming the right to hold personal papers immune from compulsory process on Fifth Amendment grounds takes root, I can see the ghost of Boyd dimly materializing as “privacy” is once again asserted as an adjunct of the right to be free of testimonial compulsion.

Finally, the Hubbell decision is disturbing for the threat it poses to the free-ranging grand jury investigation of official corruption, financial crimes, and other frauds. These are cases involving a lot of paperwork, or the electronic equivalent. Close examination of documents and other records is essential to the detection of the crime and for fixing any criminal responsibility. Without the records, prosecutors and their accountants might never get a handle on the transactions or figure out the situs of criminal agency. In other words: no documents, no case. And typically the precise paperwork or the contents of the electronic files is not known with great particularity in advance, making it difficult to obtain a search warrant. The investigative method of choice and necessity is the subpoena duces tecum. Without it, the grand jury is helpless.

The crimes I have in mind are often buried and corrosive ventures where the prosecutor and the grand jury have little more than a hunch to direct their attention in the first instance. Perhaps investigation starts on a defection, a half-suspect accusation by a former associate or co-conspirator; only enough to justify a closer look. Maybe a suspicious discontinuity in some neighboring transaction raises a prosecutorial eyebrow. An unexplained windfall, an undeserved preference, any number of barely perceptible events and circumstances may cue the alert
prosecutor that further curiosity might be fruitful. That closer look is obtained by subpoena *duces tecum*. To call the inquiry with an uncertain scope, an unclear focus, and perhaps an unidentified culprit, pejoratively a "fishing expedition" defeats the value of investigative enterprise.

If the custodian produces documents that confirm suspicion, enlarge the knowledge of the investigators, and implicate the custodian himself as the criminal entrepreneur, the *Hubbell* decision seems to say the whole case might go down as the fruit of a violation of the right not to be compelled by process to communicate inculpatory evidence. Whenever a broadly-worded, frankly inquisitive subpoena arrives in the hands of a nervous custodian of the records, she may reply not only by making a weak Fourth Amendment objection that the *duces tecum* is overbroad and oppressive, but by claiming that to bring in the requested material would help the prosecution, and will therefore violate the Fifth Amendment right not to do so. If that claim can succeed and the court will not simply dismiss it as a thinly disguised effort to privilege the contents of records, the investigatory powers of the grand jury will be severely curtailed. I'm quite certain that is not what Justice White had in mind when he wrote *Fisher*.

To recapitulate, I find the Supreme Court's decision in the case against Webster Hubbell troubling because, having rejected the correct understanding of the *Fisher* doctrine expressed by the dissenting judge below, the majority directs the remand of the case to determine a question that goes well beyond what *Fisher* requires and comes dangerously close to allowing the Fifth Amendment "privilege," and the immunity coterminous therewith, to shield the contents of freely written documents. As Judge Williams, dissenting below, correctly said, the majority, and now joined by the Supreme Court, failed to give fair weight "to the distinction between the contents of the documents and the limited testimonial significance of the act of producing them." Not only is such a failure doctrinally offensive, the pragmatic implications for future exploratory investigations are dire.