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Does Immunity Granted Really Equal Immunity Received

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DOES IMMUNITY GRANTED REALLY EQUAL IMMUNITY RECEIVED?

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

I. INTRODUCTION

In *United States v. Hubbell*,[1] the United States Supreme Court addressed whether the act of producing business records under a subpoena qualified as testimonial evidence.[2] The Court held that the act was testimonial and, therefore, the prosecution unlawfully obtained an indictment based on documents that were part of compelled production.[3]

The majority opinion identified two issues within the case:

> (1) Whether the Fifth Amendment privilege protects a witness from being compelled to disclose the existence of incriminating documents that the government is unable to describe with reasonable particularity; and (2) if the witness produces such documents pursuant to a grant of immunity, whether 18 U.S.C. § 6002 prevents the Government from using them to prepare criminal charges against him.[4]

The Court decided that the Fifth Amendment does, in fact, protect documents produced under those circumstances and that the government violated the witness's immunity by using them to prepare an indictment against him.[5] This Note examines the growth of the approaches the Court used to address these questions. This Note first argues that the Court correctly decided both of these issues. However, while the Court's analysis of Fifth Amendment protection produced the correct result, the test it used is problematic. The concurring opinion put forth a clearer, although broader, rule for determining if evidence is protected by the Fifth Amendment.[6] Additionally, this Note asserts that not only did the Court properly decide the issue of immunity, it did so following the clear, bright-line rule es-

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[1] 120 S. Ct. 2037 (2000).
[2] *Id.* at 2042-44.
[3] *Id.* at 2048.
[4] *Id.* at 2040.
[5] *See id.* at 2048.
[6] *Id.* at 2050-54 (Thomas, J., concurring).

tablished in *Murphy v. Waterfront Commission.*[7] Following this rule will enable future cases to be more easily decided.

II. BACKGROUND

A. HISTORY OF THE FIFTH AMENDMENT

The Fifth Amendment protects against the self-incrimination of a defendant by providing that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[8] Though incorporated into one of the original amendments in the Bill of Rights in 1791,[9] the privilege against self-incrimination dates back to the thirteenth century.[10]

The first well-documented case involving the protection against self-incrimination came in England in 1637.[11] In that year, John Lilburne was arrested for "having sent seditious books from Holland to England."[12] Lilburne was taken before a clerk of the attorney-general and forced to answer questions about his background and current actions.[13] Lilburne eventually refused to answer further questions regarding his past activities.[14] Upon this decision, clerks informed Lilburne that everyone took an "oath ex officio," which required witnesses to testify in open court.[15] When taken before the King's Star Chamber, Lilburne again refused to take the oath.[16] Lilburne was found in contempt of the court and imprisoned.[17] After two years of imprisonment, Lilburne petitioned Parliament for his release.[18] The House of Commons voted that Lilburne's sen-

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[7] 378 U.S. 52 (1964).

[8] U.S. CONST. Amend. V.

[9] *See* U.S. CONST. Amend. I-X.

[10] MARK BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION 1 (1980).

[11] *Id.*, at 15.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 15-16.

[15] *Id.* An "oath ex officio" provided that "every person *presented* or *indicted* of any heresy, or *duly accused by two lawful witnesses*, may be . . . committed to the ordinary [of the church] to answer in open court." 8 WIGMORE ON EVIDENCE § 2250, at 277 (1961).

[16] BERGER, *supra* note 10, at 17.

[17] *Id.*

[18] *Id.* at 17-18.

tence was "illegal and against the liberty of the subject."[19] The House of Lords ruled similarly.[20] Shortly thereafter, the "oath ex officio" was abolished from the ecclesiastical courts,[21] thus strengthening the right to protection from self-incrimination.

At approximately the same time that the English abolished the "oath ex officio," colonists began settling in the American Colonies. With the formation of the original states came the formal inclusion of the privilege against self-incrimination in the constitution or declaration of rights of eight of the fourteen states.[22] The colonial leaders were worried that common law protection against self-incrimination would not be enough, and therefore felt the need to include this "fundamental right" in a written constitution.[23] Each of these eight states with a bill of rights used the word "evidence" instead of the word "witness," which would create a broader scope of protection.[24]

The framers of the Constitution recognized the importance of the self-incrimination protection doctrine and thus included it in the four proposals for the Bill of Rights.[25] As a result of these suggestions, James Madison wrote the Fifth Amendment, substituting the word "witness" for the oft-used "evidence."[26] There was very little debate, in Congress or at the state legislatures, on the inclusion of the self-incrimination privilege in the Constitution and it was adopted unanimously, which exhibits its importance.[27] What little deliberation there was suggested that

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[19] 8 WIGMORE ON EVIDENCE § 2250, at 283 (citing *Lilburne's* Trial. 3 HOW. ST. TR. 1315 (1637-45).

[20] *Id.*

[21] *Id.*

[22] The original states that included a clause preventing self-incrimination in their constitutions or declaration of rights were Virginia (1776), Pennsylvania (1776), Delaware (1776), Maryland (1776), North Carolina (1776), Vermont (1777), Massachusetts (1780), and New Hampshire (1783). 120 S. Ct. at 2051-52. Four more of the states did not include the privilege against self-incrimination in their constitutions because they did not create a separate bill of rights, and instead relied solely on the English common law protection. BERGER, *supra* note 10, at 22. The remaining two states chose not to replace their original charter with a constitution, but still recognized the common law privilege. *Id.*

[23] BERGER, *supra* note 10, at 22-23.

[24] 120 S. Ct. at 2051-52 (citing 2 G. JACOB, A NEW LAW-DICTIONARY (8th ed. 1762); 2 T. CUNNINGHAM, NEW AND COMPLETE LAW-DICTIONARY (2 ed. 1771)).

[25] *Id.*

[26] *Id.*

[27] 2 W. LAFAVE, J. ISRAEL, & N. KING, CRIMINAL PROCEDURE 290-91 (2d ed. 1999).

"evidence" and "witness" were interchangeable.[28] However, the lack of debate also makes it difficult, and thus speculative, for scholars to analyze Madison's intentions in changing the words of the Fifth Amendment.

Although the original intent of the framers has been hard to analyze, the courts have analyzed the Fifth Amendment in many cases. *Boyd v. United States*[29] is the first such case of major significance. The issue in *Boyd* was whether the claimants would be required to produce an invoice for twenty-nine cases of plate glass.[30] In its holding, the Court found that forcing the defendants to produce private papers and books was "compelling him to be a witness against himself."[31] Thus, the Court chose to include the production of documents within the self-incrimination protection of the Fifth Amendment.[32]

The Supreme Court made no significant decisions involving the Fifth Amendment over the next eighty years, but it did review numerous cases. Among these cases were *Schmerber v. California*,[33] *United States v. Wade*,[34] and *Gilbert v. California*.[35] All three cases narrowed the scope of Fifth Amendment protection by allowing the compelled production of a blood sample,[36] a voice exemplar,[37] and a handwriting sample,[38] respectively. These decisions focused on the testimonial aspects of the evidence to determine that they were not protected under the Fifth Amendment.[39] However, none of the cases specifically defined "testimonial evidence."[40] None of these cases, however, overturned the holding of *Boyd* that defendants are not required to produce self-incriminating documents.[41]

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[28] LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT, 424-25 (Oxford University Press 1968).

[29] 116 U.S. 616 (1886).

[30] *Id.* at 618.

[31] *Id.* at 634-35. The Court also found that the requirement to produce the invoice in this case violated the Forth Amendment as well. *Id.*

[32] *See generally id.*

[33] 384 U.S. 757 (1966).

[34] 388 U.S. 218 (1967).

[35] 388 U.S. 263 (1967).

[36] *See Schmerber*, 384 U.S. at 772.

[37] *See Wade*, 388 U.S. at 222.

[38] *See Gilbert*, 388 U.S. at 277.

[39] *Schmerber*, 384 U.S. at 772; *Wade*, 388 U.S. at 222; *Gilbert*, 388 U.S. at 277.

[40] *Schmerber*, 384 U.S. at 772; *Wade*, 388 U.S. at 222; *Gilbert*, 388 U.S. at 277.

[41] *Schmerber*, 384 U.S. 757; *Wade*, 388 U.S. 218; *Gilbert*, 388 U.S. 263.

In 1976, the Supreme Court decided *Fisher v. United States*[42] and established a new standard for the Fifth Amendment. In *Fisher*, the Court determined whether the government could compel production from an accountant for his client's tax documents.[43] Though the Court primarily analyzed whether the government could compel the production from the client's accountant, it also looked at the question of whether the production could be compelled of the defendants themselves.[44]

Using the decisions in *Schmerber*, *Gilbert*, and *Wade*, the *Fisher* court held that the Fifth Amendment only protects against the production of "testimonial communication" and does not apply to "every sort of incriminating evidence."[45] It determined that the three testimonial aspects of an act of production were existence, possession, and authenticity.[46] The Court decided that producing the documents, and thereby admitting their existence and possession, would not rise to the level of testimony under the Fifth Amendment.[47] The Court further noted that the tax papers requested by the government were of the kind normally prepared by accountants.[48] Therefore, "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."[49] Since the government would have previous knowledge of the existence and location of the documents before the defendant produced the documents, the act of production would not be considered testimonial.[50] Though the *Fisher* Court refused to officially overrule *Boyd*, it distinguished *Boyd* on the ground that documents in question in *Boyd* were "private papers," whereas the documents in *Fisher* were not the defendant's own records.[51]

More recently, the Supreme Court has attempted to further clarify the scope of protection under the Fifth Amendment. In

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[42] 425 U.S. 391 (1976).
[43] *Id.* at 393.
[44] *Id.* at 405.
[45] *Id.* at 408.
[46] *Id.* at 410-11.
[47] *Id.* at 411.
[48] 425 U.S. 391, 411 (1976).
[49] *Id.*
[50] *Id.*
[51] *Id.* at 414.

United States v. Doe ("Doe I"),[52] the Court analyzed two questions: (1) whether the contents of the documents produced were privileged and (2) whether the act of producing the documents may be privileged.[53] After deciding that the records themselves were not privileged,[54] the Court held that the act of production was privileged.[55] The Court relied, in part, on the District Court's finding that the act of production entailed testimonial self-incrimination.[56] The Court ruled that production of the documents could have been compelled; however, "use" immunity would have to be granted for all potentially incriminating evidence.[57] Thus, the prosecution would be prevented from using any "incriminatory aspects of the act of production" in future prosecutions.

In *Doe v. United States ("Doe II")*,[58] the government suspected the defendant was committing fraud and tax violations.[59] In order to get his bank records, the government filed a motion for the Court to require Doe to sign twelve consent forms that would give the banks authority to turn over the records to the government.[60] The Court held that self-incrimination protection under the Fifth Amendment "may be asserted only to resist compelled explicit or implicit disclosures of incriminating information. Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn *communication of facts* which would incriminate him."[61]

Since the Court agreed with the Court of Appeals that no explicit or implicit factual declarations were conveyed to the

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[52] 465 U.S. 605 (1984).

[53] *Id.* at 612-13.

[54] *Id.* at 610-12 (holding that the government had not compelled preparation of the documents nor would the subpoena have required the defendant "to restate, repeat, or affirm the truth" of the documents contents. Since the documents would not be providing any testimonial evidence, the contents of the documents themselves were not privileged).

[55] *Id.* at 617.

[56] *Id.* at 613.

[57] *Id.* at 614-15.

[58] 487 U.S. 201 (1988).

[59] *Id.* at 202.

[60] *Id.* at 203.

[61] *Id.* at 212 (emphasis added).

government, the documents were not "testimonial"[62] and, hence, not protected under the Fifth Amendment.[63]

B. HISTORY OF IMMUNITY UNDER 18 U.S.C. SECTIONS 6002, 6003

The Fifth Amendment grants a right against self-incrimination, but that right is not an absolute right not to provide testimony.[64] The government can still compel the witness to produce testimony or documents but must offer immunity in return for the testimony.[65] Specifically, if a witness refuses to provide testimony on the ground that she will incriminate herself, then the court can require the witness to testify, but

> no testimony or 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.[66]

While section 6002 created "use and derivative use" immunity in 1970, prior to that year, the Supreme Court's ruling in *Counselman v. Hitchcock*[67] only allowed "transactional" immunity. Whereas "transactional" immunity provides "absolute immunity against future prosecution for the offense to which the question relates,"[68] "use and derivative use" immunity only provides protection for any use of just that testimony.[69] Thus, if new evidence arises in the case, independent of the testimony, it is possible for prosecution of the witness to continue under "use and derivative use" immunity, while the prosecution would be forbidden under "transactional" immunity. *Kastigar v. United States*[70] clarified the difference between "transactional" immunity

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[62] *Id.* at 215.

[63] *Id.* at 219.

[64] *See* Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

[65] *Id.* at 79 ("[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.").

[66] *See* 18 U.S.C. § 6002.

[67] 142 U.S. 547, 586 (1972).

[68] *Id.*

[69] 18 U.S.C. § 6002.

[70] 406 U.S. 441.

and "use and derivative use" immunity, and overturned *Counselman* in holding the latter to be constitutional.[71]

In *Counselman*, the witness was brought in for questioning regarding alleged violations of an act of Congress to regulate commerce.[72] During the questioning regarding his business, Counselman refused to answer some questions on the ground that he may incriminate himself.[73] After a court found that Counselman's reasons for not testifying were insufficient, he was again called before a grand jury to answer questions.[74] Upon his refusal to answer the questions, the court found Counselman in contempt of court.[75] The Circuit Court found that since section 860 of the Revised Statutes granted Counselman "use" immunity for his testimony, his Fifth Amendment rights were not violated and he was compelled to answer the questions.[76] The Supreme Court held that Section 860 of the Revised Statutes was not constitutional since it did "not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition."[77] The Court concluded that a valid statute must offer absolute immunity from future prosecution.[78]

In 1964, the Supreme Court decided *Murphy v. Waterfront Commission.*[79] The defendants were subpoenaed and requested to answer questions regarding a work stoppage at a harbor pier.[80] After refusing to testify, the defendants were granted immunity under New York and New Jersey state law, but still refused to testify.[81] The defendants asserted that the immunity provided the states did not protect them from federal law, under which they might be incriminated.[82] The court found the defendants guilty of both criminal and civil contempt.[83] The

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[71] *Id.*
[72] 142 U.S. at 548.
[73] *Id.* at 549.
[74] *Id.* at 550.
[75] *Id.* at 552.
[76] *Id.* at 559-60.
[77] *Id.* at 585-86.
[78] 142 U.S. 547, 585-86 (1972).
[79] 378 U.S. 52.
[80] *Id.* at 53.
[81] *Id.* at 53-54.
[82] *Id.*
[83] *Id.* at 54.

New Jersey Supreme Court affirmed the civil contempt ruling, and held that the defendants can be compelled to produce testimony that could be used in a federal prosecution.[84]

The Court held that the Constitution protected a witness under both state and federal law.[85] Therefore, the witness is not required to give testimony "unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution."[86] The Court decided that this protection against both state and federal prosecution would leave the witness in "substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity."[87]

The *Counselman* ruling remained constitutionally valid until *Kastigar* when the Court first analyzed 18 U.S.C. sections 6002 and 6003.[88] In *Kastigar*, the government called upon petitioners to testify before a United States grand jury.[89] Believing that petitioners would assert their Fifth Amendment right not to incriminate themselves, the government sought and received an order compelling the petitioners to testify under a grant of immunity pursuant to 18 U.S.C. sections 6002 and 6003.[90] Petitioners contended that immunity under the order was not coextensive with the privilege against self-incrimination, and therefore refused to answer questions.[91] The District court found the petitioners to be in contempt of court and the Court of Appeals affirmed.[92] The Supreme Court was only asked to decide whether "use and derivative use" immunity was constitutional or whether "transactional" immunity must be provided to compel testimony.[93]

In holding that "use and derivative use" immunity is coextensive with the privilege against self-incrimination, the Court stated that immunity under 18 U.S.C. section 6002 "prohibits the prosecutorial authorities from using the compelled testi-

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[84] *Id.*
[85] *Id.* at 77-78.
[86] *Id.* at 79.
[87] *Id.*
[88] Kastigar v. United States, 406 U.S. 441 (1971).
[89] *Id.* at 442.
[90] *Id.*
[91] *Id.*
[92] *Id.* at 442-43.
[93] *Id.* at 443.

mony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."[94] Because the testimony could not be used in any way against the witnesses, the Court found that the immunity granted under "use and derivative use" was consistent with the basis of the *Counselman* decision.[95]

Holding that section 6002 satisfied the requirement in *Murphy v. Waterfront Commission* that immunity must leave the witness "in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity,"[96] the Court decided that "use and derivative use" immunity did not violate the Fifth Amendment and therefore was constitutional.[97]

III. FACTUAL AND PROCEDURAL HISTORY

A. STATEMENT OF THE FACTS

On August 5, 1994, the Special Division[98] granted power to Independent Counsel Kenneth Starr to investigate whether any individual had committed any violation of federal crime relating to the Whitewater Development Corporation ("Whitewater") incident or the investigation connected to that incident.[99] Shortly after this grant of power, the Independent Counsel requested and received an explicit expansion of his jurisdiction to include an investigation of Webster Hubbell.[100] On December 6,

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[94] *Id.* at 453.

[95] *Id.*

[96] *Murphy* held that immunity granted under states law must also hold for prosecution under federal law. 378 U.S. 52, 79 (1964).

[97] *Kastigar*, 406 U.S. at 462.

[98] The Special Division is a panel of three judges used to appoint Independent Counsel. *See* 28 U.S.C. § 49.

[99] United States v. Hubbell, 11 F. Supp. 2d 25, 27 (D.D.C. 1998). The Whitewater incident involved overextended loans made by Madison Guaranty Savings and Loan Association and the shifting of funds between corporations including the Whitewater Development Corporation. During these activities, Madison Guaranty retained the services of the Rose Law Firm in Little Rock, Arkansas, for which Mr. Hubbell used to work. Thus, Hubbell's involvement in the incident was as Madison's counsel. *See* Jerry Seper and Frank J. Murray, *Clintons to Release Real Estate Documents White House Reverses Stand as Probe into Deal Continues*, WASH. POST, Dec. 24, 1993, at A1.

[100] However, the United States District Court observed that while Independent Counsel sought and received expansion of it power by permission of the Special Division, the Special Division has no power to "expand" the jurisdiction of the original grant of power. *Hubbell*, 11 F. Supp. 2d, at 28 n. 4.

1994, Hubbell pleaded guilty to mail fraud and tax evasion, after charges for fraudulent billings were brought against him by the Independent Counsel.[101] Hubbell began serving his twenty-one month sentence on August 7, 1995.[102]

While Hubbell was serving his sentence, the Independent Counsel served him with a subpoena to produce "all his business, financial, and tax records from January 1, 1993 to the date of the subpoena."[103] Hubbell refused to cooperate asserting that the Fifth Amendment precluded him from incriminating himself.[104] The Independent Counsel responded by moving for an order compelling production of the documents.[105] The United States District Court granted this motion[106] in accordance with 18 U.S.C. section 6002, which grants the defendant "immunity to the extent allowed by law."[107] Relying on this immunity, Hubbell produced 13,120 pages of documents pursuant to the subpoena.[108]

On January 6, 1998, Independent Counsel requested the authority to investigate whether Hubbell or any other individual committed any tax violations regarding Hubbell's income since 1994.[109] Following this request and relying heavily on the documents that Hubbell had produced, a grand jury handed down indictments against Hubbell and three others relating to the tax law violations.[110]

B. PROCEDURAL HISTORY

On July 1, 1998, Hubbell filed a motion to dismiss the indictments against him.[111] The District Court granted this mo-

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[101] *Id.* at 28.

[102] *Id.*

[103] *Id.* at 33.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] 18 U.S.C. § 6002.

[108] *Hubbell*, 11 F. Supp. 2d, at 33.

[109] *Id.* at 28.

[110] *Id.*

[111] Four motions to dismiss were actually filed by the defendants. The first, and focus of this note is the motion to dismiss on the grounds that the indictment was a violation of the "use" immunity granted to Hubbell under 18 U.S.C. § 6002. The second motion to dismiss was sought on the grounds that the indictment was beyond the jurisdiction of the Independent Counsel. While the district court originally granted this motion, the court of appeals reversed this ruling and no party has sought further

tion on the ground that the government had turned the defendant into the "primary informant against himself" by compelling the production of the documents.[112] The court relied on its determination that all of the evidence that the Independent Counsel would have brought against the defendant was derived from the produced documents.[113]

The District Court acknowledged that the three testimonial aspects of the act of production are existence, possession, and authenticity, as determined in *Fisher v. Unites States.*[114] It further noted "[e]ven if one or more of those testimonial aspects is incriminating, the Fifth Amendment privilege does not attach unless it, or they, add to the 'sum total of the government's information.'"[115] The Independent Counsel admitted that the documents Hubbell produced added to the "sum total" of the government's information about the crimes.[116] The court reasoned that the government's argument insisting that the documents were valid to use so long as no fact finder learned how the documents were produced was not practical because it ignored the question of existence.[117]

The government appealed the decision of the district court.[118] The Court of Appeals vacated the judgment of the district and remanded for further proceedings.[119] The Court of Appeals concluded that the District Court incorrectly based its decision on whether the government had previous knowledge of the contents of the documents that Hubbell produced.[120] The majority argued that "[t]he inquiry should have focused upon whether the government knew that the documents existed at all, and not upon whether the government knew of the exis-

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review of that issue. The third and forth motions to dismiss specific counts of the indictment, a motion to dismiss for failure to state an offense and a motion to dismiss for failure to comply with the Independent Counsel Reauthorization Act of 1994, were denied by the trial court. *Hubbell,* 11 F. Supp. 2d, at 37-38. Hence, the immunity question was the only issue to reach the Supreme Court.

[112] *Id.*

[113] *Id.* at 34.

[114] *Id.* at 35. *See* Fisher v. United States, 425 U.S. 391, 410-11.

[115] *Hubbell,* 11 F. Supp. 2d, at 35 (citing *Fisher,* 425 at 410-11).

[116] *Id.* at 37.

[117] *Id.* at 35.

[118] United States v. Hubbell, 167 F.3d 552 (D.C. Cir. 1999)

[119] *Id.* at 554.

[120] *Id.* at 580.

tence of the information contained therein."[121] It specifically addressed and dismissed the Independent Counsel's claim that the existence of the documents was a "forgone conclusion" since all businesses and people generally possess records.[122] In rejecting this argument, the majority clarified that previous Supreme Court decisions "require actual knowledge rather than mere inductive generalizations."[123] The Independent Counsel also claimed that it had actual knowledge of the documents.[124] The Court of Appeals majority could not answer that question with the record before them, so it remanded the case to determine the extent of the government's knowledge of the existence of the documents prior to the subpoena.[125]

Judge Williams wrote in dissent.[126] His opinion discussed the Independent Counsel's knowledge of the documents prior to Hubbell's act of production.[127] The opinion criticized the majority for concluding that all document production is testimonial in its nature, when some document production can actually be non-testimonial.[128] In fact, Judge Williams asserted that "[i]nformation as to the existence of the pieces of paper turned over by a subpoenaed party can always be traced to non-testimonial information."[129]

Specifically, Williams looked at *Fisher* as evidence that the Supreme Court did not want to follow the custom of declaring all information-gathering actions as testimonial.[130] Instead, the dissent offered that the Supreme Court only provides Fifth Amendment protection when the suspect is turned into a "source of 'real or physical evidence.'"[131] The dissent also criticized the majority for its concentration on the "foregone con-

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[121] *Id.*

[122] *Id.* at 569-70.

[123] *Id.* at 570.

[124] *Id.* at 572.

[125] *Id.* at 581.

[126] There were actually two dissenting opinions and one concurring opinion. However, the concurring opinion and other dissenting opinion related to the Court of Appeals decision regarding Independent Counsel's jurisdiction and is thus moot for the purposes of this note. *See supra* note 109.

[127] 167 F.3d at 597 (Williams, J., dissenting).

[128] *Id.* (Williams, J., dissenting).

[129] *Id.* (Williams, J., dissenting).

[130] *Id.* at 598. (Williams, J., dissenting).

[131] *Id.* (citing Schmerber v. California, 384 U.S. 757, 764 (1966)) (Williams, J. dissenting).

clusion" theory, when in fact "forgone conclusions" are merely part of a broader group of instances where "sources independent of testimonial aspects of the compulsion fully account for the prosecutor's evidence."[132] The opinion continued that since the prosecutor relied only on the information within the documents, the "communicative aspect of the act of delivery is . . . redundant."[133]

The dissent found no basis for the majority's argument that compulsion of mental faculties of the suspect is testimonial, while evidence that merely uses the body is not.[134] Williams used *Baltimore Department of Social Services v. Bouknight*,[135] where the defendant was forced to turn over a child as evidence, to establish that non-testimonial evidence should not be restricted to "the body of the accused."[136] Furthermore, the dissent observed that it would be absurd to require the government to describe in detail in the subpoena what it wanted the defendant to produce, because then the government would have no need for the documents anyway.[137] Williams concluded his opinion by stating that as long as the government relied only on the contents of the documents and not the means by which they were produced, as the government did here, then there has been no Fifth Amendment violation.[138]

On remand to the lower court, the Independent Counsel stated that it could not meet the requirement established by the Court of Appeals.[139] The Independent Counsel and Hubbell then entered into a conditional plea agreement that provided for the dismissal of the charges, unless the Supreme Court decided that the "act of production immunity" provided to the defendant would not pose a "significant bar to his prosecution."[140] However, the plea agreement called for a guilty plea by the defendant if the Supreme Court sided with the government.[141]

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[132] *Id.* at 598 (Williams, J., dissenting).
[133] *Id.* at 599 (Williams, J., dissenting).
[134] *Id.* at 600.
[135] 493 U.S. 549 (1990).
[136] 167 F.3d at 600 (Williams, J., dissenting).
[137] *Id.*
[138] *Id.*
[139] United States v. Hubbell, 120 S. Ct. 2037, 2042 (2000).
[140] *Id.*
[141] *Id.*

The Supreme Court granted the Independent Counsel's petition for a writ of certiorari to review the matter.[142]

IV. SUMMARY OF THE OPINIONS

A. THE MAJORITY OPINION

In an 8-1 decision, the Court affirmed the decision of the Court of Appeals.[143] In its opinion, written by Justice Stevens,[144] the majority reviewed a brief history of self-incrimination protection under the Fifth Amendment. The Court's review included the narrow protection awarded, what types of documents are protected, and when the Fifth Amendment protects them.[145] The Court then looked specifically at the history and scope of the "use and derivative use" immunity granted under 18 U.S.C. section 6002.[146] Following this, the Court focused on the testimonial aspects of Hubbell's production of the documents.[147] Finally, the court concluded that since the defendant's act of production was protected under the Fifth Amendment, the government had violated his grant of immunity and the charges should be dismissed.[148]

The majority opinion began by defining "witness," insofar as it concerned the Fifth Amendment, as applying only to those communications "that are 'testimonial' in character."[149] The majority recognized the observation of Justice Holmes that "there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating."[150] The majority further clarified Fifth Amendment protection by stating that Hubbell may not claim protection merely because the documents were incriminating.[151] Instead he may only claim

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[142] *Id.*

[143] 120 S. Ct. at 2048.

[144] Justices Breyer, Ginsburg, Kennedy, O'Connor, Scalia, Souter, and Thomas all joined in the opinion. Justice Thomas filed a concurring opinion. Chief Justice Rehnquist filed a dissenting opinion.

[145] 120 S. Ct. at 2043-44.

[146] *Id.* at 2044.

[147] *Id.* at 2046.

[148] *Id.* at 2048.

[149] *Id.* at 2042.

[150] *Id.* (*citing* Holt v. United States, 218 U.S. 245, 252-253 (1910)).

[151] *Id.* at 2043.

protection if by producing the documents, he "implicitly communicate[s] 'statements of facts.'"[152]

Despite this requirement, the majority noted that producing documents in response to a subpoena may have a compelled testimonial aspect.[153] The Court had previously held that "'the act of production' itself may implicitly communicate 'statements of fact.'"[154] By producing the documents, the defendant would be admitting that the documents existed, were authentic, and were in his possession or control.[155] Including this case in particular, the Court noted that the defendant who responds to a subpoena often is required to testify as to whether he produced everything required by the subpoena.[156]

The majority then eliminated the possibility that Fifth Amendment privilege against self-incrimination protects only compelled testimony that is used against the defendant at trial.[157] Citing *Hoffman v. United States*,[158] the majority adhered to the principle that the Fifth Amendment provides protection "against the prosecutor's *use of incriminating information derived* directly or indirectly from the compelled testimony of the respondent."[159]

In the next portion of the opinion, the majority reiterated the constitutionality of "use and derivative use" immunity.[160] Focusing on *Kastigar v. United States*,[161] the majority recognized that "full transactional immunity" is no longer required, so long as the immunity granted protects against future prosecution established upon the knowledge and information gained from the compelled testimony.[162] Furthermore, the majority restated that the prosecution has the affirmative duty "'to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.'"[163] Deciding

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[152] *Id.*
[153] *Id.*
[154] *Id.* at 2044.
[155] *Id.*
[156] *Id.* at 2044.
[157] *Id.*
[158] 341 U.S. 479, 486 (1951).
[159] 120 S. Ct. at 2044 (emphasis added).
[160] *Id.*
[161] 406 U.S. 441 (1971).
[162] 120 S. Ct. at 2045.
[163] *Id.* (*citing Kastigar*, 406 U.S. at 460).

that the compelled testimony in this case is not the content of the documents but rather the act of producing the documents, the majority continued its opinion by addressing the testimonial aspects of producing documents under a subpoena.[164]

For the remainder of the opinion, the majority assumed that the government would have been able to prove the existence, authenticity, and possession of any of the documents without Hubbell's act of production.[165] Justice Stevens denied the ability of the government to introduce the produced documents into evidence, as it would be a violation of the "use" immunity granted under 18 U.S.C. section 6002.[166] However, he allowed that a question still existed as to whether the government had violated Hubbell "derivative use" immunity by using the documents to obtain an indictment and prepare for trial.[167] The majority decided that the government had infringed upon the immunity granted to Hubbell.[168]

The majority began its discussion of this topic by identifying its belief that the government needed the documents produced by respondent "both to identify potential sources of information and to produce those sources."[169] Justice Stevens found it "undeniable" that the catalog of documents "could provide a prosecutor with a 'lead to incriminating evidence,' or 'a link in the chain of evidence needed to prosecute.'"[170] The majority relied on the record of the District Court to reach this decision.[171]

The opinion continued that since the indictment charged crimes different than those suspected in the subpoena, the government obviously relied on the documents as the "first step in a chain of evidence."[172] The documents the government used for the indictment were not in the possession of the government before the subpoena.[173] In fact, the government did not know of these criminal violations until after the defendant underwent the mental and physical steps to produce the documents under

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[164] *Id.* at 2046.
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Supra* note 114.
[172] United States v. Hubbell, 120 S. Ct. 2037, 2046 (2000).
[173] *Id.*

the order of the District Court.[174] The majority followed *Curcio v. United States*[175] in declaring that the defendant used his mind to produce and identify all the documents required by the subpoena.[176] The Court held that it was a violation of the Fifth Amendment right against self-incrimination to require a defendant to answer questions regarding the existence of potentially incriminating pieces of evidence.[177]

Once the majority decided that the Fifth Amendment protected against a defendant answering such questions, and it applied the same principle to the testimonial act of responding to a subpoena.[178] The majority dismissed the government's notion that even though Hubbell's act of production did have a testimonial aspect, the existence and possession of the documents was a "foregone conclusion."[179] The majority distinguished *Fisher* on the ground that the government in that case knew that the documents sought existed and were authentic.[180] The majority continued that no such similarity existed in this case.[181] Furthermore, Justice Stevens declared that the government could not rely on the "overbroad argument that a businessman such as respondent will always possess general business and tax records that fall within the broad categories described in this subpoena."[182]

With these discoveries, the majority concluded that the "act of production had a testimonial aspect, at least with respect to the existence and location of the documents."[183] Therefore, under *Kastigar*, since the government could not make a showing that all evidence used in obtaining the indictment was derived from sources "wholly independent" of the testimonial aspect of the act of production, the Court dismissed the charges against Hubbell.[184]

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[174] *Id.* at 2046-47.
[175] 354 U.S. 118, 128 (1957).
[176] 120 S. Ct. at 2047.
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.* at 2048.
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*

B. DISSENTING OPINION

In a one-line dissent, Chief Justice Rehnquist agreed with the dissent written by Judge Williams for the Court of Appeals.[185]

C. CONCURRING OPINION

The concurring opinion, written by Justice Thomas,[186] agreed with the decision of the Court, but did not feel the analysis of testimonial aspects of the act of production was necessary.[187] Thomas differed from the opinion of the majority in his belief that the current self-incrimination doctrine strays from the "original meaning of the Fifth Amendment's Self-Incrimination Clause."[188] Thomas believed that the Fifth Amendment was originally intended to protect a defendant from compelled production of any incriminating evidence.[189]

While noting that the language of the Fifth Amendment actually uses the word "witness," Thomas suggested that "witness" has a broader meaning than the majority acknowledged.[190] The majority equated "witness" with testimony, and therefore only allowed protection under the Fifth Amendment for communications "that are 'testimonial' in character."[191] However, the word "witness" historically meant a "person who gives or furnishes evidence."[192] In support for this contention, Thomas cited various legal and general dictionaries that were contemporary to the writing of the Constitution.[193] With this broader definition, a defendant who responds to a subpoena by producing documents is clearly a "witness."[194]

In further support of his assertion, Justice Thomas cited the "history and framing of the Fifth Amendment."[195] The common law before the formation of the Constitution included self-

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[185] *Id.* at 2050 (Rehnquist, C.J., dissenting). *See supra* notes 126-138 and accompanying text for discussion of Judge Williams's dissent.

[186] Justice Scalia joined in the concurring opinion.

[187] United States v. Hubbell, 120 S. Ct. 2037, 2050 (2000) (Thomas, J., concurring).

[188] *Id.* (Thomas, J., concurring).

[189] *Id.* (Thomas, J., concurring).

[190] *Id.* (Thomas, J., concurring).

[191] *Id.* (Thomas, J., concurring).

[192] *Id.* (Thomas, J., concurring).

[193] *Id.* at 2051 (Thomas, J., concurring). *See e.g.*, 2 G. JACOB, A NEW LAW-DICTIONARY (8th ed. 1762); 2 T. CUNNINGHAM, NEW AND COMPLETE LAW-DICTIONARY (2d ed. 1771).

[194] United States v. Hubbell, 120 S. Ct. 2037, 2050 (2000) (Thomas, J., concurring).

[195] *Id.* at 2051 (Thomas, J., concurring).

incrimination protection against the compelled production of any incriminating evidence.[196] Thomas also mentioned legislation that protected a defendant's right not to produce any incriminating evidence instead of merely testimony.[197] Justice Thomas specifically noted that eight of the original thirteen states had clauses in their constitutions that prevented compelled production of evidence.[198] In addition, Thomas revealed that the four original states to propose a bill of rights included a self-incrimination protection clause that used the word "evidence."[199] James Madison, in writing the Fifth Amendment, substituted the phrase "to be a witness" from the suggested proposals.[200] Due to the history of self-incrimination privilege and the meaning of the word "witness," Thomas felt it was likely that Madison changed the wording without wishing to change the meaning of the protection.[201] The concurrence suggested that this explains why there was no opposition to the switch.[202]

Justice Thomas also analogized the use of the word "witness" in the Fifth Amendment with its use in the Sixth Amendment.[203] Citing *United States v. Burr*,[204] Thomas stated that the Sixth Amendment allows a defendant to bring any evidence to his defense.[205] Thus, a narrow definition of "witness" would not follow the ruling in *Burr*.[206]

Finally, the concurrence concluded by acknowledging that *Fisher* rejected the decision in *Boyd*.[207] However, the opinion advanced that the *Fisher* court did not properly adhere to the precedent set by *Boyd* or follow the historical meaning of the Fifth Amendment.[208] Therefore, Thomas stated that while the Court correctly decided the instant case, at a future date, he

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[196] *Id.* (Thomas, J., concurring).
[197] *Id.* (Thomas, J., concurring).
[198] *Id.* at 2051-52 (Thomas, J., concurring).
[199] *Id.* at 2052 (Thomas, J., concurring).
[200] *Id.* (Thomas, J., concurring).
[201] *Id.* (Thomas, J., concurring).
[202] *Id.* (Thomas, J., concurring).
[203] *Id.* at 2053 (Thomas, J., concurring).
[204] 25 F. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807).
[205] United States v. Hubbell, 120 S. Ct. 2037, 2053 (2000) (Thomas, J., concurring). Specifically, the court allowed the defendant the right to secure papers. 25 F. Cas. at 34-35.
[206] *Hubbell*, 120 S. Ct. at 2053 (Thomas, J., concurring).
[207] *Id.* (Thomas, J., concurring).
[208] *Id.* at 2054. (Thomas, J., concurring).

might be forced to reevaluate *Fisher* and the historical meaning of the Fifth Amendment.[209]

V. ANALYSIS

The Supreme Court, in *United States v. Hubbell*,[210] correctly dismissed the indictment against the defendant because the government violated 18 U.S.C. section 6002 when it used the documents that defendant was compelled to produce to obtain the indictment.[211] First, in making its decision, the Court held that the defendant's act of production was testimonial and therefore protected under the Fifth Amendment self-incrimination clause.[212] The decision is consistent with the precedent of previous Supreme Court cases; however, it is not consistent with the historical intent of the Fifth Amendment.[213] Furthermore, problems arise when determining whether evidence is testimonial and thus protected under self-incrimination.[214] The majority's decision to analyze whether the defendant's act of production was testimonial in its nature further complicates an area of law where no definite rule exists.[215] The Court should have reconsidered the Fifth Amendment privilege against self-incrimination and restored it to its original broad scope of protection.[216] Secondly, the government properly extended the "derivative" immunity protection to include the documents themselves and not just the act of producing them.[217] The majority's decision on this issue is consistent with the case law precedent and original intent of the statute.[218] Also, the analysis used by the majority reiterates a bright line test previously used by the Court to determine whether the prosecution has violated "use and derivative use" immunity, thus setting a clear standard for future courts.[219]

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[209] *Id.* (Thomas, J., concurring).

[210] United States v. Hubbell, 120 S. Ct. 2037 (2000).

[211] *Id.* at 2046-48.

[212] *Id.*

[213] *Id.* at 2050-52 (Thomas, J., concurring).

[214] Schmerber v. California, 384 U.S. 757, 774 (1966) (Black, J., dissenting).

[215] Charles Gardner Geyh, *The Testimonial Component of the Right Against Self-Incrimination*, 36 CATH. U. L. REV. 611, 635 (1987).

[216] United States v. Hubbell, 120 S. Ct. 2037, 2050 (2000) (Thomas, J., concurring).

[217] *Id.* at 2047-48.

[218] *See infra* § V.B.

[219] *Hubbell*, 120 S. Ct. at 2048.

A. ISSUE OF WHETHER THE ACT OF PRODUCING DOCUMENTS WAS PROTECTED BY THE FIFTH AMENDMENT

Eight of nine Supreme Court Justices felt that Hubbell's production of documents under immunity granted by 18 U.S.C. section 6002 was testimonial in its nature.[220] While the concurrence felt that the test for testimony was futile since the Fifth Amendment protects all incriminating evidence,[221] it agreed that the majority correctly analyzed the defendant's response to the subpoena under existing case law.[222] The majority noted that *Doe II*[223] supports it claim that evidence must be testimonial for the privilege of self-incrimination to apply.[224] In *Doe II*, the Court ruled that the self-incrimination privilege only applies to incriminating communication of facts. [225] This principal is consistent with earlier Supreme Court cases as well.[226] In *Schmerber*, for instance, the Court ruled that "the [self-incrimination] privilege is a bar against compelling 'communications' or 'testimony.'"[227]

After the majority decided that the documents themselves might not be protected, it proceeded to analyze whether the act of production was protected.[228] Relying again on *Doe II*, the Court concluded that the act of production "may communicate information about the existence, custody, and authenticity of the documents," and therefore may be testimonial.[229] In *Fisher*, the Court admitted that the act may be testimonial because it "tacitly concedes the existence of the papers demanded and their possession or control."[230] The act of production may be testimonial by itself, but it is almost certainly testimonial when it requires the defendant to take the stand and testify that he has produced everything required.[231]

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[220] *Id.*

[221] *Id.* at 2050 (Thomas, J., concurring).

[222] *Id.* at 2042-43.

[223] Doe v. United States ("Doe II"), 487 U.S. 201, 212 (1988).

[224] United States v. Hubbell, 120 S. Ct. 2037, 2043 (2000).

[225] *Doe II*, 487 U.S. at 212.

[226] *See also* Murphy v. Waterfront Commission, 378 U.S. 52, 79 (1964); Bellis v. United States, 417 U.S. 85, 89-90 (1974); Andreson v. Maryland, 427 U.S. 463, 470-71 (1976).

[227] Schmerber v. California, 384 U.S 757, 764 (1966).

[228] *Hubbell*, 120 S. Ct. at 2044.

[229] *Id.* (citing *Doe II*, 487 U.S. at 209-10.).

[230] Fisher v. United States, 425 U.S. 391, 410 (1976).

[231] *Hubbell*, 120 S. Ct. at 2044.

While the theory is grounded in valid law, the majority never explained why, in this case, the act of production was testimonial.[232] The majority opinion moved from determining that the act may be testimonial to assuming that it was testimonial: "It is the Fifth Amendment's protection against the prosecutor's use of incriminating information derived directly or indirectly from the compelled *testimony* of the respondent that is of primary relevance in this case."[233] This is especially problematic as this issue is where the appellate court dissent disagrees with the majority.[234]

Although the majority made no explicit finding that the act of production was testimonial, its reasoning was superior to that of the dissent. The dissent rested its decision on the assumption that the existence of documents can be traced to non-testimonial information.[235] In doing this, however, the dissent disregarded the holding of *Doe I* for two reasons, neither of which are sound.[236] First, the dissent argued that the ruling in *Doe I* was a decision that upheld the fact finding of the lower court and not the law.[237] However, as the Court of Appeals majority noted, this distinction did not affect the legal holding of the case.[238]

Secondly, the dissent argued that the Court held that production of documents could provide evidence of authenticity but never stated production of documents could prove existence, which was the only issue in the current case.[239] Once more, the majority suggested that the dissent misread the case and that production of documents could admit existence and possession.[240] As the specific language of *Doe I* states, "[w]ith few exceptions, enforcement of the subpoenas would compel [respondent] to admit that the records exist, that they are in his possession, and that they are authentic."[241] Thus, the dissent

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[232] *Id.* at 2044.

[233] *Id.* (emphasis added).

[234] United States v. Hubbell, 167 F.3d 552, 597 (D.C. Cir. 1999) (Williams, J., dissenting).

[235] *See supra* note 126-138 and accompanying text.

[236] *Hubbell*, 167 F.3d at 570, n.24.

[237] *Id.* at 599 (Williams, J., dissenting).

[238] *Id.* at 570, n.24.

[239] *Id.* at 599 (Williams, J., dissenting).

[240] *Id.* at 571, n.24.

[241] United States v. Doe ("Doe I"), 465 U.S. 605, 614 n.11 (1984) (citing In the Matter of the Grand Jury Empanelled, 541 F. Supp. 1,3 (D. N.J. 1981)).

failed to distinguish or nullify a valid precedent.[242] Furthermore, the dissent neglected to account for the verbal testimony that Hubbell provided along with the produced documents.[243] The dissent ignored the authenticity and possession aspects of testimony that *Fisher* requires.[244]

While the majority opinion reaches the correct decision, the opinion is not flawless. First, the approach of the majority is inconsistent with the historical intent of the Fifth Amendment.[245] Secondly, looking at whether evidence is "testimonial" does not create a clear precedent and therefore may create future problems.[246]

As Justice Thomas noted in his concurrence, recent decisions of the Supreme Court, including this one, appear to be contrary to the historical meaning of the Fifth Amendment.[247] The historical meaning of the Constitution at the time of its enactment is important because it is the public understanding and meaning that counts.[248] The Constitution should be analyzed in a manner similar to how the public would have interpreted it when it was written.[249] As Justice Thomas's opinion stated, during the time period when the Bill of Rights was passed, "witness" was defined as a "giver of evidence."[250] Thus, the two words were nearly synonymous. The similarity between the words was seen in 1789, when John Laurence questioned Madison's suggested amendment that no one shall be compelled to be a witness against himself.[251] In arguing that the amendment be limited to criminal cases, Laurence referred to the proposal as the one

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[242] *Hubbell*, 167 F.3d at 571, n.24.

[243] *See* United States v. Hubbell, 11 F. Supp. 2d 25, 35 (D.D.C. 1998). (The district court found that Hubbell made communications regarding the authenticity, possession, and existence of the documents.)

[244] *See supra* note 45.

[245] United States v. Hubbell, 120 S. Ct. 2037, 2050 (2000) (Thomas, J., concurring).

[246] Schmerber v. California, 384 U.S. 757, 774 (1966) (Black, J., dissenting).

[247] *Hubbell*, 120 S. Ct. at 2052 (Thomas, J., concurring).

[248] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW, 143-46 (1990).

[249] *Id.*

[250] United States v. Hubbell, 120 S. Ct. 2037, 2051 (2000) (Thomas, J., concurring); *see e.g.* 2 G. JACOB, A NEW LAW-DICTIONARY (8th ed. 1762); 2 T. CUNNINGHAM, NEW AND COMPLETE LAW-DICTIONARY (2d ed. 1771).

[251] LEVY, *supra* note 28, at 424.

where "a person shall not be compelled to give evidence against himself."[252]

As time went by, however, the definition of "witness" changed into "one who testifies to what he has seen, heard, or otherwise observed."[253] This may account for why the *Schmerber* Court required that evidence be testimonial before it may be protected.[254] However, it still appears to be contrary to the original intent of the Fifth Amendment to provide protection at least as broad as was provided under English common law.[255] As further proof, Thomas cited to the legislative materials from the writing of the Constitution to verify that the writers of the Constitution indeed included the word "witness" to mean all evidence.[256]

Although these sources illustrate Thomas's argument, perhaps the most persuasive evidence in favor of original intent is the Court's early decisions such as *Boyd v. United States*,[257] *Counselman v. Hitchcock*,[258] and *Gouled v. United States*.[259] While *Counselman* and *Gouled* have since been overturned, all three of these cases, as early analyses of the Fifth Amendment, set the meaning and interpretation for the phrase "to be a witness."[260] Even though the Court has held many aspects of *Boyd* to be invalid, thus not following the precedent set, it has never overruled *Boyd*.[261] Instead, it has "carved exceptions out of the analysis in *Boyd*," such as eliminating self-incrimination protection for "non-testimonial" evidence and business records.[262] All that appears to be left of *Boyd* is its protection of private papers.[263] Until the Court officially overturns and reverses its decision in *Boyd*,

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[252] *Id.*

[253] JOSEPH R. NOLAN & JACQUELINE M. NOLAN-HALEY, BLACK'S LAW DICTIONARY, (6th ed. 1990).

[254] Schmerber v. California, 384 U.S. 757, 764 (1966).

[255] LEVY, *supra* note 28, at 428.

[256] *Hubbell*, 120 S. Ct. at 2051 (Thomas, J., concurring). *See e.g.* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 931 (1833); 2 DEBATES ON THE FEDERAL CONSTITUTION 111 (J. Elliot 2d ed., 1854) (Mr. Holmes, Mass., Jan. 30, 1788).

[257] 116 U.S. at 633-34.

[258] 142 U.S. at 566.

[259] 255 U.S. 298, 306 (1920).

[260] *Schmerber*, 384 U.S. at 775-76 (Black, J., dissenting).

[261] In re Grand Jury Subpoena Duces Tecum, 741 F. Supp. 1059, 1067-68 (S.D.N.Y. 1990).

[262] *Id.* at 1066.

[263] *Id.*

however, it is ignoring the earliest case interpreting Fifth Amendment protection against self-incrimination.

Besides failing to follow the original intent of the Fifth Amendment, the Court also missed an opportunity to clarify a rule that has created policy problems and confusion.[264] The Court followed precedent in holding that an act of producing documents needs to be a compelled testimonial communication before it is provided protection under the Fifth Amendment.[265] The problem with this approach is that there is not an exact or definite test to determine if an act is testimonial.[266] The *Schmerber* court based its decision on "[h]istory and a long line of authorities in lower courts."[267] However, that Court never explained why or how it chose the "testimonial aspect" approach.[268] Furthermore, the majority in *Schmerber* did not take into consideration the "significant minority of jurisdictions" which had held conversely.[269] This "failure to offer any guidance as to what distinguishes sufficiently testimonial acts from insufficiently testimonial acts leaves the impression that its decisions on the question are purely arbitrary."[270]

This approach used by the Court lacks "clarity and precision."[271] The problem is even further evidenced by the "labored explication" that each Supreme Court decision has gone through in recent decisions involving the same issue.[272] The same historical issues and holdings regarding the testimonial aspects of compelled production are discussed in nearly every Fifth Amendment compelled production case, because there exists no bright line test for the Court to enforce.[273]

Furthermore, the reasons behind the institution of the "testimonial aspects" test appear to have derived not from case law

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[264] Geyh, *supra* note 215, at 635.

[265] *Hubbell*, 120 S. Ct. at 2042. *See, e.g., Schmerber*, 384 U.S. at 761; *Doe*, 487 U.S. at 212.

[266] *Schmerber*, 384 U.S. at 774 (Black, J., dissenting).

[267] *Id.* at 762-63.

[268] *Id.*

[269] Geyh, *supra* note 215, at 622.

[270] *Id.* at 635.

[271] *Schmerber*, 384 U.S. at 774 (Black, J., dissenting).

[272] *Id.* Justice Black's dissent observation of a "labored explication" specifically concerns just the *Schmerber* majority, but no Court since *Schmerber* has attempted to elucidate the problem.

[273] *See, e.g., Hubbell*, 120 S. Ct at 2042-43; *United States v. Doe*, 465 U.S. at 612-13; *Doe v. United States*, 487 U.S. at 209-10.

precedent, but from a secondary legal source: Wigmore on Evidence, which when analyzed deeper, does not prove persuasive.[274] Wigmore put forth three major explanations for why documents must have testimonial aspects to be protected under the self-incrimination privilege.[275]

The first reason is in response to "the process of the ecclesiastical court" which relied on putting the defendant upon the stand under oath.[276] This concern is not as prevalent today as it was during the 1700s because the justice system has changed to include more physical evidence instead of relying mostly on oral accounts.[277]

Secondly, requiring "testimonial" evidence helped "stimulate the prosecution to a full and fair search for evidence procurable by their own exertions."[278] However, this reason seems ineffective and unnecessary since the right exists to ensure that the prosecution alone obtains any evidence. Thus, under this reason, it would be inappropriate to garner any evidence from the suspect regardless of whether it is testimonial.[279]

The final reason Wigmore used for suggesting a "testimonial aspects" test is a policy argument.[280] Without the testimonial requirement, Wigmore believed all evidence would be protected and therefore the prosecution would never be able to form a case against the defendant.[281] However, this reason misinterprets the protection of the self-incrimination privilege. The privilege only applies to the compelled cooperation of the defendant and does not apply to the independent investigation of the police.[282] Hence the prosecution could still form cases against the defendant, so long as the police conducted the investigation without any assistance from the suspect.[283]

All of the reasons Wigmore used to establish a testimonial requirement in the evidence are either irrelevant or outdated.[284]

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[274] *Schmerber*, 384 U.S. at 774 (Black, J., dissenting).
[275] Geyh, *supra* note 215, at 624-25.
[276] *Id.*
[277] *Id.*
[278] *Id.*
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*

Since the foundation for the rule has been rendered illegitimate, the Court should either abandon the rule or find other support for it. Justice Thomas's suggestion provides the answer. It eliminates the need for a discussion of whether the act of production has a "testimonial aspect."[285] Thomas calls for a return to the broad protection of the self-incrimination clause that was seen both in the original intent of the Fifth Amendment[286] and reaffirmed in *Boyd*.[287] Thomas's approach provides protection under the Fifth Amendment for any production of documents.[288] His rule is consistent with the literal meaning of the Fifth Amendment, as it was when it was written in 1793.[289]

Although the definitions of "evidence" and "witness" have diverged over the years, causing a slight change in the meaning of the words, the framers of the Constitution did not include the requirement that evidence be testimonial in the Fifth Amendment.[290] Neither was there any mention of the "testimonial" requirement in any of the proposals, debates, or similarly written state bills of rights.[291] Instead, that requirement developed out of scholarly legal authority[292] and a change in vocabulary,[293] thus providing no legal precedent for its establishment.

Furthermore, Justice Thomas's method creates a lucid, comprehensible rule for future courts to obey.[294] Instead of analyzing whether evidence is testimonial, the only question the courts will have to decide is whether the defendant produced the evidence. The current line of analysis, a determination of whether the production was testimonial, has problems as evidenced at the Court of Appeals.[295] Justice Thomas's suggested method, however, leaves no discretion to the courts or judges, which eliminates the possibility of split decisions. Instead, any

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[285] 120 S. Ct. at 2053-54 (Thomas, J., concurring).

[286] *See, e.g.*, 2 DEBATES ON THE FEDERAL CONSTITUTION 111 (J. Elliot 2d ed., 1865).

[287] *See generally* 116 U.S. 616 (1886).

[288] 120 S. Ct. at 2053-54 (Thomas, J., concurring).

[289] *Id.*

[290] *See generally* BERGER, *supra* note 10; LEVY, *supra* note 28.

[291] *Id.*

[292] Geyh, *supra* note 215, at 629-30.

[293] *Hubbell*, 120 S. Ct. at 2042 (The majority defines "witness" as it was used in recent cases and scholarly authority.)

[294] *Id.* at 2050; *see also supra* notes 186-209 and accompanying text.

[295] Compare the majority view, 167 F.3d at 570-72 (that the production was testimonial) with Judge Williams's dissent, 167 F.3d at 597-600 (that the production was not testimonial).

evidence that the witness produces will be protected under the Fifth Amendment, similar to the protection provided by the amendment at its conception.[296]

B. ISSUE OF WHETHER USE OF DOCUMENTS TO PRODUCE INDICTMENT WAS VIOLATION OF "USE AND DERIVATIVE USE IMMUNITY"

Whereas the majority reached the correct decision on the issue of whether the act of production was protected under the Fifth Amendment with flawed reasoning, it correctly decided the issue of immunity in a well reasoned and clearly articulated manner.[297] The majority's decision that the prosecution's use of the documents was a violation of 18 U.S.C. section 6002 is ideal for two reasons. First, the decision is consistent with the historical purpose of earlier case law and the original intent of the legislation.[298] Second, the decision provides a clear framework for future courts to decide the issue by creating a question of fact.[299]

In its decision the majority held that the government violated the "derivative use" of the defendant's compelled production in obtaining the indictment and using the documents to gather other information that was not compelled production from the defendant.[300] The majority relied on the findings of the District Court that the compelled production was "the first step in a chain of evidence that led to this prosecution."[301] As the opinion further noted, the immunity granted under section 6002 is coextensive with the Fifth Amendment privilege against self-incrimination.[302]

In *Murphy v. Waterfront Commission*, the Court acknowledged that "use and derivative use" immunity "leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege."[303] Hence the test established by *Murphy*, and used by *Kastigar* and this Court, is whether the prosecution can prove that they have an "inde-

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[296] 120 S. Ct. at 2050 (Thomas, J., concurring).
[297] 120 S. Ct. at 2045.
[298] *See* Pilsbury Co. v. Conboy, 459 U.S. 248, 260-61 (1983).
[299] *See* United States v. Dudden, 65 F.3d 1461, 1469 (9th Cir. 1995).
[300] 120 S. Ct. at 2046
[301] *Id.*
[302] *Id.*
[303] 378 U.S. 52, 79 (1964).

pendent, legitimate source for the disputed evidence."[304] The *Hubbell* majority then decided that since the Independent Counsel did not assert that they could prove such a finding and, in fact, admitted that they could not, the use of the produced documents to obtain the indictment violated the "derivative use" immunity of section 6002.[305]

The purpose of the "use and derivative use" immunity statute is to balance the fundamental privilege against self-incrimination with the government's need to obtain information through subpoenaed testimony.[306] Even though the Court has overruled *Counselman* with respect to its holding regarding transactional immunity, it is important to remember the purpose behind the Court's decision in that case.[307] The Court stated that the "use" immunity was invalid, because it did not offer "complete protection from all perils against which the constitutional prohibition was designed to guard."[308] The "wholly independent" test in *Kastigar* adheres to that central principal of *Counselman* because it prevents the compelled testimony from being used in a future prosecution.[309]

Since immunity will be violated if the prosecution cannot prove that it could have obtained the evidence from a "wholly independent" source, the defendant is offered the same protection as if he had claimed his Fifth Amendment privilege.[310] In fact, the protection under section 6002 may even be stronger than the protection under the Fifth Amendment, because once compelled testimony is shown, the government has "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources."[311] The Fifth Amendment, on the other hand, first requires a voluntariness hearing before the testimony becomes inadmissible.[312] Thus, this test does satisfy the concerns of *Counselman*.[313]

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[304] *Id.*
[305] 120 S. Ct. at 2048.
[306] United States v. Lacey, 86 F.3d 956 (10th Cir. 1996).
[307] *See supra* notes 72-78 and accompanying text.
[308] *Counselman*, 142 U.S. at 586.
[309] *See supra* note 78.
[310] *Kastigar*, 406 U.S. at 458-59.
[311] *Id.* at 461-62.
[312] *Id.*
[313] *Id.*

C. THE "WHOLLY INDEPENDENT" TEST ALSO SATISFIES THE ORIGINAL INTENT OF SECTION 6002

The purpose of section 6002 was to limit the scope of immunity to the level that is constitutionally required, as well as to limit the use of immunity to those cases in which the Attorney General, or officials designated by him, determines that gaining the witness's testimony outweighs the loss of the opportunity for criminal prosecution of that witness.[314]

Thus, the prosecution can prosecute someone who gives minimal or useless evidence under "use and derivative use" immunity whereas that prosecution was not available under "transactional" immunity.[315] The problem of offering a witness immunity to disclose his testimony only to find out that he has no useful information is therefore eliminated.[316]

The "wholly independent" test protects the purpose of section 6002 by allowing the government to determine which "witness's testimony outweighs the loss of the opportunity for criminal prosecution," and in which situations the government would rather prosecute the witness than use his testimony.[317] If the government decides to prosecute someone whom they have offered "use and derivative use" immunity to under section 6002, the "wholly independent" test allows them to continue in such a prosecution subject to a showing of fact that they used other legitimate sources.[318] If the prosecution can prove that its sources are "wholly independent" of the witness's testimony, then the prosecution can proceed as the nature and purpose of section 6002 dictate.[319]

The decision in *Hubbell* was proper because it adhered to the clear bright line test to decide whether the immunity had been broken, as established in *Kastigar*.[320] For all its discussion

[314] *Pilsbury Co.*, 459 U.S. at 260-61.

[315] *See* United States v. McGuire, 45 F.3d 1177, 1182-84 (8th Cir. 1995) (Court upheld the conviction of defendants John Macdacina relating to a murder even though the defendant had provided testimony regarding gambling operations under section 6002 because a *Kastigar* hearing showed that the sources were "wholly independent" of the compelled testimony).

[316] *See id.*; United States v. Dynalectric Company, 859 F.2d. 1559 (11th Cir. 1988) (Court upheld the conviction of defendant after it was determined that his testimony provided no useful information).

[317] *Id.*

[318] *Kastigar*, 406 U.S. at 460 (1972).

[319] *Pilsbury Co.*, 459 U.S. at 260-61.

[320] *See supra* notes 94-97 and accompanying text.

and debate over the immunity granted under section 6002, the issue funnels down to one question: whether the evidence used by the government to obtain the indictment was "wholly independent" of the documents produced in response to the subpoena.[321] This *Kastigar* hearing creates a clear question of fact, not a question of law, which any fact finder can determine.[322] Many district courts have used the "wholly independent" test and *Kastigar* hearings to determine if prosecutors violated the "derivative use" immunity that was granted to the defendants.[323] As it is purely a question of fact, the "wholly independent" test is easy for district courts to use in determining whether the government has violated immunity or not.

VI. CONCLUSION

The Court held that the Independent Counsel violated "use and derivative use" immunity granted under 18 U.S.C. section 6002.[324] In determining whether the defendant's act of production was protected, the Court invoked the unfounded and outdated test of whether the evidence was testimonial.[325] While the Court reached the correct conclusion, it missed an opportunity to either institute a new bright line test with which to use in the future or return to the historical intent of the Fifth Amendment.[326] Contrarily, the Court followed a bright line test to determine whether the government had violated a grant of immunity.[327] In *Hubbell*, the Court correctly provided Fifth Amendment protection in a deserved situation but failed to broaden the scope of that protection to help future witnesses.

Ryan McLennan

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[321] *Hubbell*, 120 S. Ct. at 2048.

[322] *Dudden*, 65 F.3d at 1469.

[323] The holding in *Hubbell* merely reiterated the rule of *Kastigar*. Hence, district cases that have used the *Kastigar* hearing are evidentiary of the validity of the *Hubbell* court. *See, e.g., Dudden*, 65 F.3d at 1469; *McGuire*, 45 F.3d at 1182-84; United States v. Harris, 780 F. Supp. 385 (N.D.W.V. 1991); United States v. Stanfa, 1996 WL 417168 (E.D. Pa. 1996).

[324] *Hubbell*, 120 S. Ct. at 2047-48.

[325] Geyh, *supra* note 215, 624-26.

[326] *Hubbell*, 120 S. Ct. at 2050-54 (Thomas, J., concurring).

[327] *Id.* at 2047-48.