Granted

No. 99-166

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
WEBSTER L. HUBBELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES

ROBERT W. RAY *
Independent Counsel
PAUL ROSENZWEIG
Senior Litigation Counsel
DAVID G. BARGER
KARL N. GELLERT
Associate Independent Counsel
1001 Pennsylvania Ave., N.W.
Suite 490-N
Washington, D.C. 20004
(202) 514-8688
* Counsel of Record

RONALD J. MANN
The University of Michigan
Law School
625 So. State Street
Ann Arbor, MI 48109-1215

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Fifth Amendment's privilege against self-incrimination protects information previously recorded in voluntarily created documents that a defendant delivers to the government pursuant to an immunized act of production.

2. Whether a defendant's act of producing ordinary business records constitutes a compelled testimonial communication solely because the government cannot identify the documents with reasonable particularity before they are produced.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Mr. Hubbell is respondent in these proceedings. In addition, Suzanna W. Hubbell, Michael C. Schaufele, and Charles C. Owen were parties to the proceedings in the district court and the court of appeals. Ms. Hubbell, Mr. Schaufele, and Mr. Owen were notified of the pendency of these proceedings as required by Sup. Ct. R. 12.6. Thereafter, they did not notify the Clerk of their interest in remaining parties to this action.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 99-166

UNITED STATES OF AMERICA, *Petitioner*,

v.

WEBSTER L. HUBBELL, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-112a) is reported at 167 F.3d 552. The opinion of the district court (Pet. App. 113a-140a) is reported at 11 F. Supp. 2d 25.

JURISDICTION

The judgment of the court of appeals was issued on January 26, 1999. Pet. App. 1a. The court denied a timely petition for rehearing and suggestion for rehearing en banc on May 4, 1999. Pet. App. 141a-143a. The petition for a writ of certiorari was filed on July 26, 1999. This Court granted the petition on October 12, 1999. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part: "No person shall be * * * compelled in any criminal case to be a witness against himself."

18 U.S.C. § 6002 provides in relevant part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States, * * *
>
> and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; 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.

STATEMENT

On April 30, 1998, a federal grand jury in the District of Columbia returned a ten-count indictment charging respondent and others with a variety of income tax-related offenses. J.A. 9-44. On July 1, 1998, the district court dismissed the indictment (as to all defendants) as beyond the jurisdiction of the Office of the Independent Counsel and also (as to respondent alone) as a violation of respondent's Fifth Amendment privilege against compelled self-incrimination. Pet. App. 113a-140a. On January 26, 1999, the court of appeals reversed both of those holdings and remanded the case to the district court for proceedings on the indictment. Pet. App. 1a-112a. The government sought review of that decision by this Court because the legal standard that the court of appeals articulated on the self-incrimination question made it infeasible for the government to bring respondent to trial.

1. The questions presented in this case arise from a subpoena that a federal grand jury in the Eastern District of Arkansas issued to respondent in 1996. The subpoena sought production of a variety of specified business and income records. *See* J.A. 46-53 (requiring production of, generally, bank records, calendars, phone records, and tax records). When respondent interposed a claim of privilege under the Fifth Amendment, the government obtained an order compelling production under 18 U.S.C. §§ 6002, 6003. J.A. 60-61. Thereafter, respondent appeared before the grand jury, produced a number of documents, and testified that the produced materials were the result of a complete search for documents responsive to the subpoena. Pet. App. 25a-26a; *see* J.A. 62-70 (respondent's testimony before the grand jury).

The government used the information contained in those documents, together with a variety of other investigative sources, to develop the various tax-related charges alleged in the indictment. Because all of the charges could be substantiated without the use of the documents produced by respondent or evidence that he possessed them, the government had no need to use the documents themselves at trial, although it did make substantial use of their contents in the investigation that led to the indictment. *See* Pet. App. 29a, 67a n.37.

2. The district court granted respondent's motion to dismiss the indictment on the ground that it violated his

Fifth Amendment privilege. Pet. App. 128a-137a.[1] The district court acknowledged the firmly established rule "that the contents of voluntarily prepared documents are never protected by the Fifth Amendment privilege" (Pet. App. 131a), but ruled nonetheless that the Constitution would not permit the government to use the contents of those documents that respondent produced. The court rested its ruling on the view that respondent's production of the documents constituted an implicit testimonial assertion of the existence of those documents. Pet. App. 133a-137a.

The district court did not reject the government's assertion that the government already knew that respondent maintained records of the types subpoenaed. Nor did the district court indicate any respect in which it was incriminating for respondent to admit through his act of production that the documents existed. Nevertheless, the court held that the contents of the documents were protected by the Fifth Amendment privilege unless the government could establish that it already was aware of "the existence of the information contained in the documents." Pet. App. 137a n.15.

3. The government appealed, and the Department of Justice appeared as an *amicus curiae* urging reversal of the district court's decision on the Fifth Amendment issue.[2] The court then unanimously rejected the district court's holding that the government could not use the contents of the documents unless the government could establish that it already was aware of the contents. Pet. App. 36a

[1] The district court also dismissed the indictment as beyond the jurisdictional authority of the Office of the Independent Counsel. Pet. App. 114a-127a.

[2] The court of appeals reversed the district court on the jurisdictional issue. Pet. App. 2a-22a. No party has sought further review of that question.

n.23. But the panel divided on the question of exactly what the government must establish in order to use the contents of the documents.

a. The majority of the panel first considered whether the production of the documents was sufficiently testimonial to constitute a compelled testimonial communication. Pet. App. 36a-62a. On that point, the court rejected the government's contention that respondent's production of the documents did not rise to the level of testimony because the existence of the documents was a foregone conclusion. *Compare Fisher v. United States*, 425 U.S. 391, 411 (1976) (explaining that the production of documents is not a testimonial communication if their existence is a "foregone conclusion"). The panel ultimately concluded that the existence of documents is not a foregone conclusion for purposes of the Fifth Amendment unless the government can "demonstrat[e] with reasonable particularity a prior awareness that the * * * documents sought in the subpoena existed and were in [the defendant]'s possession." Pet. App. 62a.

The court also rejected the government's view that production of the documents was not incriminating (a view that rests on the idea that respondent admitted at most that he possessed several classes of customary business records). Building on its analysis of the foregone conclusion question, the court determined that the act of production would be incriminating if the existence of the produced documents was not a foregone conclusion or if the act of production would authenticate those documents. Pet. App. 62a-65a.

Having concluded that the act of production in this case involved incriminating testimonial communications, the court turned to the larger question—the extent to which incriminating communications implicit in the act of pro-

duction can taint theretofore unprivileged contents of documents that a defendant produces under compulsion. Pet. App. 65a-72a. The court began by identifying the "testimony" that is sometimes implicit in the act of production: that the documents exist, that the defendant has them in his possession, and that they are authentic. It then broadly held that the implicit testimony that documents exist always taints the contents of the documents, reasoning that the contents are "derived" from that implicit testimony for purposes of the Fifth Amendment. The court extended that rule even to cases (like this one) in which the existence of the documents themselves (as distinguished from the information that they contained) was irrelevant to the investigation and would be irrelevant to any trial of the charges contained in the indictment. The court explained that, in its view, a contrary holding "essentially eviscerates the act of production doctrine." Pet. App. 68a.

b. Judge Williams dissented from the court's analysis of the Fifth Amendment questions. Pet. App. 100a-12a. In his view, this Court's decision in *Fisher* compelled the conclusion that the existence of the documents was a foregone conclusion, because "these papers' own physical presence [wa]s 'self-evident' at the time and place of production and so long thereafter as the government maintains proper custody." Pet. App. 105a. As he explained, "[t]he particular documents' existence speaks for itself once they have been delivered." Pet. App. 106a.

Judge Williams also disputed the majority's conclusion that the testimonial aspects of the act of production tainted the contents of the documents. He explained: "[T]he act of production doctrine shields 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." Pet. App. 111a (citing DOJ Amicus Br. at 42; Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 59-60 (1986)).

4. Because the standard articulated by the court of appeals made it infeasible to bring respondent to trial, and in view of the practical and legal significance of the court's analysis, the government filed a petition for rehearing and a suggestion for rehearing en banc.[3] The court of appeals denied the petition for rehearing, with Judge Williams dissenting. Pet. App. 141a. With two judges recused, the nine-member court denied the suggestion for rehearing en banc over the dissent of four judges. Pet. App. 142a-143a.

5. On June 30, 1999, after the mandate issued from the court of appeals, respondent entered a conditional guilty plea to a superseding information covering conduct related to the indictment in this case. J.A. 104-115; *see* J.A. 116-17 (text of superseding information). That agreement includes a commitment by the government that it will move to vacate respondent's conviction if this Court resolves this case in a way that "fails materially to improve the United States's position to the point that it is reasonably likely that [respondent]'s act of production immunity does not pose a significant bar to his prosecution." Conversely, if the Court accepts our position in this case, then the judgment of conviction will not be vacated. J.A. 106-07.

---

[3] In response to a call for its views from the court of appeals, the Department of Justice filed a brief supporting the suggestion for rehearing en banc.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Amendment provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." At the same time, 18 U.S.C. § 6002 permits the government to compel self-incriminating testimony, so long as the government grants the witness immunity that is "coextensive" with the Fifth Amendment privilege. *Kastigar v. United States*, 406 U.S. 441, 452-53 (1972). Here, respondent produced information under the compulsion of Section 6002. The fundamental question then is whether that information is derived from some compelled testimonial aspect of respondent's act of production, thereby compelling respondent to be a witness against himself. Our answer—that the information is not derived from governmental compulsion because the government will make no use of the testimonial aspects of respondent's act of producing that information—follows from the text of the Fifth Amendment, and this Court's decisions construing the privilege against self-incrimination.

1. The Constitution affords no general Fifth Amendment protection to the contents of voluntarily recorded documents. The Court's decisions in *Fisher* and in *United States v. Doe*, 465 U.S. 605 (1984), substantially rejected the contrary decision in *Boyd v. United States*, 116 U.S. 616 (1886). Those decisions extended to the context of documents a lengthy line of cases (originating with *Schmerber v. California*, 384 U.S. 757 (1966)), which generally recognize that the Fifth Amendment permits investigative techniques that do not compel testimonial communication.

The decisions in *Fisher* and *Doe* reflect the textual limitations of the Fifth Amendment privilege and the difficulty of extending the privilege to cases in which the defendant is compelled only to produce documents. Em-

bodied in the Clause's use of the phrase "to be a witness" is a limitation that takes on particular significance when contrasted with the markedly broader language used in the contemporaneous state bill of rights provisions from which the Fifth Amendment was drawn. Those provisions, which more broadly prohibited compulsion to "give evidence," are much more readily applied to the production of documents than the language of the Fifth Amendment itself.

The view of the court of appeals—that *any* incriminating testimonial communication automatically taints the contents of the produced documents and bars any investigatory or prosecutorial use of those contents—is at odds with the clear determination of the majority in *Fisher* and *Doe* and disrupts the settled fabric of Fifth Amendment law. In *Fisher* and *Doe*, the Court held that the contents of documents generally are not protected by the Fifth Amendment. Here the court of appeals has, in effect, adopted the absolutist position Justice Marshall articulated in his opinion concurring in the judgment in *Fisher*. But in *Fisher* and *Doe* the Court adopted a more balanced view, under which the government often would be able to use the contents of compelled documents.

At a minimum, the government should be able to use the contents of compelled documents unless there is some substantial relation between the compelled testimonial communications implicit in the act of production (as opposed to the act of production standing alone) and some aspect of the information used in the investigation or the evidence presented at trial. Absent such a relation, it makes no sense to conclude that the documents are "derived" from the compelled testimonial communications in any way.

Stated differently, the act of production itself cannot taint the contents of the documents produced; the Fifth

Amendment is offended only if the government somehow relies on a testimonial aspect of respondent's production of the documents—by arguing, for example, that his production of the documents proves that he possessed them. In this case, none of the compelled testimonial communications are relevant to any aspect of the investigation or proof of the charges: The government need not make any use of respondent's admission that he possessed the documents, that the documents were authentic, or that the documents ever existed. In short, *nothing* resulted from the act of production alone that in any way compelled respondent to be a "witness" against himself. In these circumstances, the privilege does not prohibit the government from making investigative use of the pre-existing, voluntarily created contents of the documents.

The distinction between the protected testimonial communications and the unprotected nontestimonial act of production itself is not a mere formality. It rests directly on the framework that the Constitution provides to regulate criminal investigation. That framework does not (and could not sensibly) reflect a general distrust of investigatory actions by the government, even when those actions extract evidence from the target of an investigation. The Constitution includes separate and specific provisions that bar certain types of investigatory activity—precluding, for example, unreasonable intrusions on interests protected by the Fourth Amendment and forced testimonial communication proscribed by the Fifth Amendment. Outside those bounds, the government is free to use its powers of compulsion, subject to the more general restrictions of the Due Process Clause. Thus, it is central to this case that the information contained in the documents produced was recorded by respondent (or others) voluntarily—not under compulsion—and that the government obtained that information not through the forbidden tactic of compelling

respondent to restate it or affirm its accuracy, but through the entirely permissible tactic of compelling him to produce the physical evidence containing the information.

2. The case also presents a narrower question: whether the act of production in this case included any admission that constituted an "incriminating communication." On that question, the case is controlled by *Fisher v. United States*, 425 U.S. 391 (1976). In *Fisher*, this Court concluded that the mere production of documents did not implicate the privilege because the defendant's possession of those documents was a "foregone conclusion." This case, like *Fisher*, involves a subpoena that seeks production of typical and customary business records (including tax and bank account records), which the government naturally would expect a businessman, like respondent, to maintain. Under *Fisher*, respondent's production of such ordinary business records is not sufficiently testimonial to implicate the Fifth Amendment. The contrary conclusion of the court of appeals is incorrect.

ARGUMENT

I. THE PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT EXTEND TO THE CONTENTS OF VOLUNTARILY CREATED DOCUMENTS SOLELY BECAUSE THE DEFENDANT IS COMPELLLED TO PRODUCE THE DOCUMENTS TO THE GOVERNMENT

The compelled testimonial communication implicit in an act of production does not taint the otherwise unprivileged, voluntarily created, pre-existing contents of the documents produced. This is the case whenever the government makes investigative use of the contents of documents compelled under 18 U.S.C. § 6002 but does not need to rely on a defendant's testimonial communication

to prove his possession of the documents, the existence of the documents or their authenticity.

Our analysis proceeds in two steps. First, it is now well-established that the Constitution does not directly protect the information contained in voluntarily recorded documents. Respondent attempts to avoid the implications of that point by arguing that the government's possession of the information is derived from the compelled act of production. Our second point rebuts that attempt: Information that previously has been recorded voluntarily before compulsion is brought to bear cannot sensibly be treated as the fruit of any testimonial communication implicit in the act of production. The government obtains that information directly from the physical act of production—an act that the Fifth Amendment does not protect—and it in no sense is derived from respondent's compelled testimony.

A. The Privilege Against Self-Incrimination Does Not Protect Information Contained in Voluntarily Created Documents

For more than two decades, it has been clear that the Self-Incrimination Clause does not protect a defendant against incrimination by information that the defendant (or others) voluntarily has recorded in a document. Thus, as the Court explained in *Doe*, when "the preparation of * * * papers * * * [i]s wholly voluntary, * * * they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else." 465 U.S. at 611. Stated most directly: "a person may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded." *Baltimore City Dep't of Social Services v. Bouknight*, 493 U.S. 549, 555 (1990); *see also Doe*, 465 U.S. at 618 (O'Connor, J., concurring) ("[T]he Fifth

Amendment provides absolutely no protection for the contents of private papers of any kind.").

This Court's decisions in *Doe* and *Fisher* reflect the considered rejection of a much older line of authority which recognized a general constitutional protection for private papers. *See, e.g., Boyd*, 116 U.S. at 630; *Doe*, 465 U.S. at 618 (O'Connor, J., concurring) ("The notion that the Fifth Amendment protects the privacy of papers originated in *Boyd*."). In recent decades, the Court repeatedly and explicitly has criticized the rationale of *Boyd* and rejected its holdings. Thus, the Court in *Fisher* rejected the "proposition"—which the Court attributed to *Boyd*—"that the Fifth Amendment prevents compelled production of documents over objection that such production might incriminate." 425 U.S. at 405. The Court explained that "[s]everal of *Boyd*'s express or implicit declarations have not stood the test of time," *id.* at 407, that "the foundations for the rule [of *Boyd*] have been washed away," *id.* at 409, and that "the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment," *id.* Although the Court has yet to expressly overrule *Boyd*, it is now clear that "very little, if anything, remains of *Boyd*'s Fifth Amendment analysis." WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE § 8.12(a), at 8-526 (2d ed. 1999) (forthcoming) [hereinafter LAFAVE, ISRAEL & KING] (internal quotation omitted).

In rejecting *Boyd*, this Court has established beyond any doubt that the Fifth Amendment "does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating." *Fisher*, 425 U.S. at 408. Thus,

the Court repeatedly has held that the Fifth Amendment does not prohibit the compulsory production of physical evidence, even when that production necessitates a witness's physical act. The forced collection of blood samples (*Schmerber*, 384 U.S. at 763-65), handwriting exemplars (*Gilbert v. California*, 388 U.S. 263, 266-67 (1967)), and voice exemplars (*United States v. Dionisio*, 410 U.S. 1, 5-7 (1973)) are all permitted. The Amendment also permits compelled participation in a lineup (*United States v. Wade*, 388 U.S. 218, 221-23 (1967)), the compelled completion of a bank disclosure form (*Doe v. United States*, 487 U.S. 201, 207-14 (1988)), the forced production of a child, even if examination of the child might reveal incriminating information (*Bouknight*, 493 U.S. at 554-555), the forced display of potentially incriminating attire (*Holt v. United States*, 218 U.S. 245, 252-53 (1910)), and the videotaping of slurred speech probative of a defendant's sobriety (*Pennsylvania v. Muniz*, 496 U.S. 582, 590-92 (1990)). All these cases make clear that nontestimonial physical acts may be distinguished from their implicit testimonial components and that compelling the acts themselves is not proscribed by the Fifth Amendment.

Applying that same reasoning, the Court in *Fisher* concluded that the Constitution permits the enforcement of a document subpoena. The Court acknowledged that the enforcement of the subpoena "without doubt involves substantial compulsion." 425 U.S. at 409. Still, the Court reasoned:

> [I]t does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, *for the privilege protects a person only against being incriminated by his own compelled testimonial communications. Id.* at 409 (emphasis added).

As Justice Powell later explained in *Doe*, "[w]here the preparation of business records is voluntary," the privilege is not implicated because "no compulsion is present." 465 U.S. at 610. Given the concession of the respondent in *Doe* that the documents were created voluntarily, the Court concluded that "[t]he 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." *Id.* at 612.

The Court's conclusion that the privilege does not protect the contents of voluntarily created documents is well-grounded in the text of the Fifth Amendment. The crucial phrase in the Self-Incrimination Clause bars only compulsion that results in respondent "be[coming] a witness against himself." It is at best a strain to treat the act of producing documentary evidence as "be[ing] a witness." The words, on their face, most naturally refer to the delivery of oral testimony. *See* Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 676 (1968) ("The picture immediately conveyed is of a defendant on trial for crime being dragged, kicking and screaming, to the stand or, more realistically, being imprisoned for refusal to testify."); *see also White v. Illinois*, 502 U.S. 346, 358-60 (1992) (Thomas, J., concurring) (discussing the meaning of the word "witness" at the time of the Bill of Rights) (quoting *Maryland v. Craig*, 497 U.S. 836, 864-65 (1990) (Scalia, J., dissenting)).

If the Framers of the Bill of Rights had intended to extend the privilege to *any* compelled production of evi-

dence, the existing state constitutions provided conspicuously broader models. The most common phrasing provided that a person could not "be compelled to give evidence against himself." *See* DEL. DECL. OF RIGHTS § 15 (1776); MD. DECL. OF RIGHTS art. 20 (1776); N.C. DECL. OF RIGHTS § VII (1776); PA. CONST., art. IX, § IX (1790); VA. DECL. OF RIGHTS art. VIII (1776); and VT. CONST. ch. I, art. 10 (1777), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 328-30 (Neil H. Cogan ed. 1997) [hereinafter Cogan, ORIGINS].[4] In drafting the Fifth Amendment, Madison used narrower language seemingly limited to actions that actually make the accused a "witness" against himself.[5]

Although neither the language of the Constitution nor the Court's emphatic rejection of *Boyd* in *Fisher* and *Doe* directly addresses the reasoning of the court of appeals, the vigor of the Court's analysis in those cases casts grave doubt on the court of appeals's decision. That decision

[4] This language apparently was drafted by George Mason for the Virginia Declaration of Rights and taken from that document for use in the other states. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 405-10 (1968); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1118-20 (1994). Massachusetts and New Hampshire used a slightly different phrasing, providing that a person could not be compelled "to accuse" or to "furnish evidence against" himself. MASS. CONST. pt. I, art. XII (1780); and N.H. CONST. pt. I, art. 15 (1783), *reprinted in* Cogan, ORIGINS, at 328-29.

[5] The significance of Madison's choice to prohibit only actions that made the accused a "witness" is underscored by the frequency with which state proposals for a federal bill of rights used the broader "give evidence" language. *See* N.Y. Proposal, July 26, 1788; N.C. Proposal, Aug. 1, 1788; Pa. Minority Proposal, Dec. 12, 1787; R.I. Proposal, May 29, 1790; and Va. Proposal, June 27, 1788, *reprinted in* Cogan, ORIGINS, at 326-28. *See generally* Moglen, *Taking the Fifth*, 92 MICH. L. REV. at 1121-22.

effectively resurrects the now-discarded result in *Boyd* and sweeps the production of most—if not all—documentary evidence back within the ambit of the Fifth Amendment privilege.

B. An Act of Production Does Not Automatically Taint the Contents of Voluntarily Recorded Documents Simply Becaues It Includes an Incriminating Testimonial Communication

Starting from an unexceptional premise—the possibility, recognized in *Fisher* and *Doe*, that acts of production might involve incriminating testimonial communications—the court of appeals proceeded to the dubious conclusion that the contents of documents automatically are tainted in any case in which the act of production involves such a communication. Thus, while the court of appeals, of course, did not directly revive *Boyd* and hold that the contents of voluntarily recorded documents are directly protected by the Fifth Amendment privilege, it nevertheless did so indirectly.

It is important to emphasize the breadth of the court of appeals's holding. The scope of the automatic taint rule adopted by the court below is clearest from the passage at Pet. App. 71a, where the court declared generally that "*Kastigar* forbids the derivative use of the information contained [in documents produced under compulsion] against the immunized party"; *see also* Pet. App. 56a-57a n.33 (concluding that the government's *"a posteriori* knowledge [of compelled documents] is inextricably linked with the communicative testimony inherent in the subpoena response"). That language reflects the view of the court of appeals regarding whether an act of production involves a testimonial communication of sufficient incriminating force to implicate the Fifth Amendment. And the only qualification of that broad statement is a limita-

tion of the holding to cases in which "the government did not have a reasonably particular knowledge of subpoenaed documents' actual existence," Pet. App. 71a. Significantly, in the view of the court of appeals, there are *no* cases in which the voluntarily created contents of the produced documents will not be entirely privileged whenever the defendant's compelled act of production also involves an incriminating testimonial communication.

As we explain in Point II below, the court of appeals erred in concluding that the act of production in this case involved such a communication. But the more serious error is the holding that any such communication automatically taints the theretofore unprotected, voluntarily created contents of the documents. The reasoning of the court of appeals on that point undermines the decisions of this Court in *Fisher* and *Doe* and, more generally, ignores the reasoning and implications of this Court's decision in *Schmerber*.

1. *The Incriminating Testimonial Component of the Act of Production Does Not Automatically Taint the Contents of the Produced Documents*

a. *The Implications of* Fisher

The Court, in *Fisher*, recognized that "[t]he act of producing evidence in response to a subpoena * * * has communicative aspects of its own, wholly aside from the contents of the papers produced." 425 U.S. at 410. For example, "[c]ompliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer." *Id.*; *see also id.* at 413 (discussing the possibility that compliance with a subpoena would authenticate the produced documents). By noting that the privilege extended to those kinds of tacit testimonial communications, the Court suggested that

the privilege would prevent the government from using such a compelled tacit communication against the defendant. *See id.* at 413. For this reason, the Court in *Fisher* did not articulate an absolute "no-taint" rule—that the government would never be prohibited from using the contents of voluntarily produced documents. Rather, the Court recognized that there might be a class of cases where the government's use of the contents is derived from some testimonial component of the act of production.

But the Court made it equally clear that those tacit testimonial communications would be irrelevant in cases in which "[t]he existence and possession or control of the subpoenaed documents" were not "in issue," *id.* at 412—that is, where there was no nexus between the testimonial communications and the government's use of the voluntarily created contents of the documents produced. Not a single word of the *Fisher* opinion supports the view of the court of appeals—that the Court's recognition of the relatively inconsequential testimonial concessions implicit in the act of production was designed to resurrect the specter of *Boyd* by automatically tainting the contents of the produced documents.

Indeed, the only substantial precedential support for the court of appeals's decision lies in the opinion of Justice Marshall, concurring in the judgment in *Fisher*. Proposing an understanding of the Court's opinion much like that of the court of appeals, Justice Marshall argued that the implicit testimony of existence would "effectively shield the contents of the document, for the contents are a direct fruit of the immunized testimony that the document exists." 425 U.S. at 434 (Marshall, J., concurring in the judgment).

The reductive nature of Justice Marshall's reading of *Fisher* is evident from his frank acknowledgment that he

was "hopeful that the Court's new theory * * * will provide substantially the same protection as our prior focus on the contents of the documents." 425 U.S. at 432 (Marshall, J., concurring in the judgment); *see* LAFAVE, ISRAEL & KING, § 8.13(c), at 8-605 ("As a practical matter, since act-of-production immunity would usually be needed because of uncertainty as to existence and possession, Justice Marshall's view ordinarily would remove the document from consideration in any possible prosecution of the person who produced it with act-of-production immunity."). Because Justice Marshall was unwilling to join the opinion of the Court, and because his views did not attract any Member of the Court who did join *Fisher*, his opinion is hardly a reliable guide to the meaning of the Court's decision.[6]

The vigor of *Fisher*'s criticism of *Boyd* suggests that Justice Marshall's automatic-taint view is just as unacceptable as the opposing "no-taint" view. The former overemphasizes the importance of the communicative aspects of an act while the latter ignores those aspects altogether. Resolution of this case turns on defining the boundary of the intermediate question left open by *Fisher*—precisely when is it sensible to say that the government's use of the contents of documents produced under compulsion is derived from a testimonial communication implicit in the act of production? *Fisher* did not address the issue because that subpoena did not involve any testimonial communication subject to the Fifth Amendment. *See* 425 U.S. at 414.[7] That issue is presented here.

[6] Justice Marshall's subsequent determination to join Justice Kennedy's dissent in *Braswell v. United States*, 487 U.S. 99 (1988), suggests that even Justice Marshall did not long retain the view of *Fisher* that he expressed at the time.

[7] Nor did *Doe* resolve the issue. In *Doe*, production of the documents at issue had not yet been compelled. *See* 465 U.S. at 607-08.

The appropriate resolution of that issue should give force to both this Court's strong criticism of *Boyd* and its recognition of the testimonial implications of the act of production. Thus, the privilege is not infringed unless there is some substantial relation or connection between the compelled testimonial communications and some aspect of the information used in the investigation or the evidence presented at trial. *Cf. Segura v. United States*, 468 U.S. 796, 815 (1984) (requiring significant causal connection to alleged government misconduct before suppression); *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963) (same). To put it more directly, the privilege applies *only* if some information used by the government is the fruit not only of the compelled physical act of production, but, more specifically, of the compelled testimonial communications implicit in that act. In the language of *Fisher*, the testimonial communications inherent in an act of production infringe upon the Fifth Amendment privilege only in cases in which an aspect of those communications is "*in issue*," 425 U.S. at 412 (emphasis added).

To be sure, there are several classes of cases in which the privilege would, under that construction, apply. The classic case, for example, would be a prosecution in which the defendant's possession of the documents at the time of the subpoena was "in issue" because the government needed to prove his knowledge of their contents. *Cf. Bouknight*, 493 U.S. at 555 ("her implicit communication of control over Maurice at the moment of production might aid the State in prosecuting Bouknight"). *Fisher* would bar use of this act of production to prove a defendant's possession. Another obvious example would be a case in which the government received a stack of documents that could be identified only by the nature of the production: for example, a stack of papers covered only

with numbers produced in response to a subpoena calling for "records of all of the contributions that you have received from" specified individuals. *Fisher* would prevent the government from using the defendant's admissions to establish the meaning and significance of the documents which it can discern only from defendant's act of production.

Here, however, neither the information used in the government's investigation, nor the evidence that would have been presented at trial, depends in any way on respondent's implicit testimonial communications that the documents exist, that they are authentic, or that he possessed them. Respondent's implicit testimony that the documents existed is irrelevant here because the government would not need to prove the existence of the particular documents to establish the charges in the indictment. The irrelevance of any implicit authentication of the documents or evidence of respondent's control of the documents is even clearer. Neither the investigation nor the prosecution of respondent is derived, directly or indirectly, from any information contained in respondent's compelled testimonial communications, as distinguished from the voluntarily recorded information contained in the documents that he produced.[8] Thus, aside from the automatic-taint view advanced by Justice Marshall in *Fisher*, there

[8] As one commentator explains:

> [W]here the government uses the contents solely to establish something other than the very testimonial fact which rendered the act of production privileged, such use is outside the ambit of derivative use and is permitted. In these circumstances, although there may very well be a tenuous causal connection between the immunized act of production and the government's use of the produced items, that connection is *too attenuated to be afforded legal significance.*

Kenneth J. Melilli, *Act-of-Production Immunity*, 52 OHIO ST. L.J. 223, 261 (1991) (footnote omitted) (emphasis added).

is no plausible basis for application of the privilege in this case.

b. *The Implications of the Later Cases*

Although none of the Court's cases has directly resolved the question raised by *Fisher* and presented in this case, the analysis of the Court in subsequent cases and the assumptions that appear to underlie its reasoning cast grave doubt on the automatic-taint rule of the court of appeals and bolster a more measured understanding of *Fisher.*

This Court, in *Doe,* specifically responded to a claim identical to the claim presented here—that testimonial communications implicit in the act of production automatically bar the use by the government of the contents of the produced documents—and dismissed "this contention" as "unfounded." 465 U.S. at 617 n.17. The Court explained that immunity "need be only as broad as the privilege against self-incrimination," and that "the privilege in this case extends only to the act of production. Therefore, any grant of use immunity need only protect respondent from the self-incrimination that might accompany the act of producing his business records." *Id.*[9] To be sure, it is conceivable that the Court's phrasing was intended to convey that the "self-incrimination that might accompany the act of producing his business records" automatically would taint the contents of the documents, but the unadorned rejection of this very result as "unfounded" earlier in the text of the same footnote makes

[9] The quoted language appears in a case in which the Court already had concluded that it was bound by the lower court findings that the subpoena in question involved an incriminating testimonial communication. *See* 465 U.S. at 613-14. Thus, the *Doe* Court considered a situation, similar to the one we presume for purposes of this portion of our analysis, in which the defendant had made a sufficiently substantial testimonial communication to call the Fifth Amendment privilege into play.

that reading strained at best.[10] As with *Fisher,* the only plausible reading of the opinion is this: The contents of voluntarily created documents are not derived from the testimonial communications implicit in the subsequent act of production, and thus are not tainted by the compelled nature of those communications. *See also Doe,* 465 U.S. at 618 (O'Connor, J., concurring) ("[T]he Fifth Amendment provides absolutely no protection for the contents of private papers of any kind."). The taint can come only from some specific use of the defendant's compelled testimonial communications—not his physical acts.

The Court's more recent opinions in *Braswell* and *Bouknight* provide further support for our reading of *Fisher* and *Doe.* In *Braswell,* the Court considered whether a closely held corporation should be treated as an individual (and thus entitled to assert the Fifth Amendment privilege) or like a public corporation (which has no privilege). Although the Court divided 5-4 on that question, the Justices were of one mind on the point relevant to this case: The contents of documents were unprivileged even after their compelled production. The Court (per Rehnquist, C.J.) explained that "[t]here is no question but that the contents of the *subpoenaed* business records are not privileged." 487 U.S. at 102 (emphasis added). Although the Court discussed the effect of immunity at length, it never qualified that absolute statement to suggest that the incriminating testimonial communications implicit in the act of production somehow would taint those contents and extend the privilege to them. Justice Kennedy's dissent (joined by Justices Brennan, Marshall, and Scalia) makes the point more broadly, stating that "the contents

[10] It also seems implausible to suggest that the author of the Court's opinion in *Doe* simply forgot or disregarded the significance of the opinion that he had written for the Court several years earlier in *Kastigar.*

of business records prepared without compulsion can be used to incriminate even a natural person *without implicating Fifth Amendment concerns." Id.* at 120 (emphasis added). For the dissenters, "the contents of business records produced by subpoena are not privileged under the Fifth Amendment, absent some showing that the documents were prepared under compulsion." *Id.* at 121. Both the majority and the dissent refer to documents that the government would obtain under a compelled act of production, and both describe the contents as unprivileged, a consensus that simply cannot be reconciled with the automatic-taint rule of the court of appeals.

Finally, the Court's analysis in *Bouknight* conflicts with the decision below. In that case, the Court considered an order compelling production of a minor child. The Court recognized the possibility that production of the child would lead to the discovery of incriminating evidence, but dismissed that concern as insignificant:

> When the government demands that an item be produced, the only thing compelled is the act of producing the item. The Fifth Amendment's protection may nonetheless be implicated because the act of complying with the government's demand testifies to the existence, possession, or authenticity of the things produced. But a person may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the things demanded. Bouknight therefore cannot claim the privilege based upon anything that examination of Maurice might reveal, nor can she assert the privilege upon the theory that compliance would assert that the child produced is in fact Maurice. 493 U.S. at 554-55 (alteration, internal quotation, and citations omitted).

Again, it is possible to find an alternative explanation for the ultimate decision—the Court also relied heavily on

the significance of the state's regulatory regime related to children, 493 U.S. at 556-61—but a Court interpreting *Fisher* as respondent does could not have characterized so blithely the ability of the government to use information derived from the act of producing the child.

* * * *

There is no square holding or precise statement by this Court adopting our understanding of *Fisher* and *Doe* and the implications of the Court's rejection of the antiquated *Boyd* precedent. But the Court's consistent, repetitive, and emphatic statements that the voluntarily created contents of documents are not privileged—even documents produced under a compulsion that involves a testimonial communication protected by the Fifth Amendment—is flatly inconsistent with the view that any such communication "inextricably" (Pet. App. 56a-57a n.33) taints those contents.

2. *The Automatic-Taint Rule Announced by the Court of Appeals Is Inconsistent with* Schmerber *and Its Progeny*

The erroneous reasoning embraced by the court of appeals starts with its unwillingness to grapple with the logical implications of the line of decisions that begins with *Schmerber*. Both of the lower courts proceeded from the perspective that the Constitution generally is hostile to investigative practices that allow the government to build a case against a defendant based on evidence taken from the defendant involuntarily. *See* Pet. App. 49a-50a (court of appeals refers to "the anti-extortion principle which has become the motivating force of self-incrimination doctrine"); Pet. App. 137a (district court criticizes the government for "turn[ing]" respondent "into the primary informant against himself").

That perspective reflects a fundamental misapprehension of the scope of the constitutional limits on the investigation of criminal activity. "[T]he Court has never on any ground * * * applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which * * * did not involve compelled testimonial self-incrimination." *Fisher*, 425 U.S. at 399; *see also Doe*, 465 U.S. at 611 n.8. Thus, the Constitution includes specific limitations on governmental investigatory practices, the most important of which are the Fourth Amendment's requirement that searches and seizures be reasonable and the Fifth Amendment's prohibition of compelled self-incrimination. But outside those two areas, and subject to the general protections of the Due Process Clause, *see Rochin v. California*, 342 U.S. 165, 168-74 (1952), there is no general limitation on the government's power to collect evidence from the targets of its investigations.

If the government wishes to search an individual's premises, it either must show probable cause sufficient to justify a warrant or present some justification adequate to excuse the absence of a warrant. But if—as in this case—it chooses not to invade the defendant's premises with a nonconsensual search, then the government can rely on "the long standing principle that 'the public has a right to every man's evidence.' " *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (ellipsis omitted); *see also* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 40-41 (1993) (discussing the view, dating to Bentham, that "an intrusive search * * * seems more 'cruel' than requiring suspects * * * to answer questions").

The grand jury's authority to compel the production of evidence is "[a]mong the necessary and most important of the powers * * * [that] assure the effective functioning of government in an ordered society." *Kastigar*, 406 U.S. at 444 (internal quotation omitted). As one leading treatise explains, in a society without a general obligation to provide evidence, "criminal activity could be hidden be-

hind a wall of silence that finds no justification in legal privilege." LAFAVE, ISRAEL & KING, § 8.6(a), at 8-254. Because the grand jury obtains evidence without the privacy-invading intrusions regulated by the Fourth Amendment, it generally is entitled to evidence free from any restraint comparable to the necessity of showing probable cause. *See United States v. R. Enterprises*, 498 U.S. 292, 297 (1991); LAFAVE, ISRAEL & KING, § 8.6(a), at 8-255.

As a result, provided that the method does not violate the Fourth Amendment or involve the compulsion of a testimonial communication protected by the Fifth Amendment, the Court regularly has countenanced the use of procedures by which the government compels the target of an investigation to provide incriminating evidence. The most prominent example is *Schmerber*, which rejected application of the privilege against self-incrimination to the forcible collection of a blood sample. And *Schmerber* is not an outlier limited by later decisions. To the contrary, it has been the fount of a long string of cases permitting the involuntary collection of evidence in a wide variety of circumstances. *See supra* page 14 (citing cases that have extended *Schmerber*'s reasoning). As a result, modern police practice is founded on the government's authority to compel the production of physical evidence.

Thus, it is not enough for respondent to rely solely on what we concede—that the incriminating evidence was derived from the documents that respondent produced. Rather, the privilege prevents the government's use of the contents of the documents only if two additional circumstances are present: (i) an implicit incriminating testimonial communication—something that, as we argue in Point II, this case does not involve; and (ii) a determination that the voluntarily created information contained in the documents produced is derived from that communi-

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

We readily agree that the government has the documents—and the information that they contain—because respondent gave them to the government. But the government's possession of the documents is the fruit *only* of a simple physical act—the act of producing the documents. The contrary view—that the documents are derived from some testimonial communication—rests on the tortured notion that the government obtained the documents not through the physical act of production, but through respondent's implicit testimonial admission that the documents existed, an admission that is irrelevant to any substantive issue. As the opinion of the court of appeals illustrates, that line of reasoning is almost Thomist in its unremitting insistence on turning the focus of analysis from the material and physical world to an invisible and metaphysical conceptual system. *See also* Friendly, *Fifth Amendment Tomorrow*, 37 U. CIN L. REV. at 702 (arguing that the reliance on testimonial assertions implicit in the act of production to justify application of the privilege in *Boyd* "reeks of the oil lamp").

The conceptual error infecting the opinion of the court of appeals is that it collapses the non-testimonial physical act of production into the incidental testimonial admissions sometimes implicit in the act of production. The court seemed to equate the fact that the documents exist with a testimonial communication asserting that existence. Thus, the court of appeals views document production as

a primarily testimonial matter, with some incidental unprivileged physical activity occurring on the side. *See, e.g.*, Pet. App. 50a n.31 ("[The act of producing documents] provides testimony *rather than* physical or real evidence.") (emphasis added). Yet, the dispositive portion of the opinion (Pet. App. at 65a-72a) simply ignores the rule that the Fifth Amendment does not protect the contents of voluntarily created documents. The clear analysis of *Fisher*—which imports the *Schmerber* analysis to the area of document production, and firmly rejects the *Boyd* notion that the Fifth Amendment should limit the government's access to this type of evidence—cannot be reconciled with the reasoning of the court of appeals.

The illogical implications of the D.C. Circuit's analysis are perhaps clearest in the pivotal, concluding portion of its analysis. There, the majority defends its interpretation of the Fifth Amendment by describing this as a case in which "the testimonial value of document production is high, and the government obtains a large quantum of information directly from the witness's mental faculties." Pet. App. 70a-71a. That analysis is entirely wrong. The act of production in this case has absolutely no evidentiary value—to prove the tax charges in the indictment, the government would not have needed to establish that *any* of the documents existed or were authentic, let alone that the defendant was in possession of them or produced them to the government—and the government is not exploiting any information obtained from compelled exercise of the witness's mental faculties. What was compelled was the physical act of production, which revealed nothing of significance about respondent's mental faculties; what revealed information of significance about his mental faculties (the contents of the documents) was not compelled. *Compare Schmerber*, 384 U.S. at 763 (explaining that, whatever the policies of the privilege might suggest in the

abstract, the constitutional privilege always has forbidden only "the cruel, simple expedient of compelling [evidence] from [the defendant's] own mouth") (internal quotation omitted); *see also Fisher*, 425 U.S. at 412 (the Fifth Amendment does not limit the compelled production of documents in cases in which "the existence and possession or control of the subpoenaed documents [are] no more in issue * * * than in the above cases").

Finally, although not strictly relevant—because it is so clearly established that Section 6002 extends immunity precisely as far as, and no farther than, the Fifth Amendment—this understanding of the Constitution is consistent with the language of the statute. The immunity described in Section 6002 is limited to "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)." That language is consistent with the government's use of the information provided by respondent. The information in question was neither "compelled under the order"—respondent and other individuals voluntarily recorded it at some earlier time—nor "directly or indirectly derived from" testimony or information compelled under the order. If it was derived from anything, it was derived from two unprotected actions: (i) the voluntary creation of the documents by respondent and others; and (ii) respondent's nontestimonial, physical act of production. On that point, it is illuminating that the district court felt it necessary to elide the crucial language of the statute in order to explain its view that this case fell within the statutory grant of immunity. *See* Pet. App. 130a (explaining that Section 6002 protects "information [gained through a grant of immunity]") (alteration by district court); *id.* at 131a (dismissing the indictment based on the finding that "the charges brought against [respondent were] directly or indirectly derived from the

documents [respondent] produced under subpoena") (emphasis added).

At bottom, all of the useful information that the government obtained from respondent's act of production is derived from the voluntary creation of the documents by respondent and others. The relevant exercise of respondent's mental faculties occurred at the time the documents were created, long before the subpoena was served. Because none of the information was "derived from" respondent's compelled communications, and because the privilege protects only information that is compelled, all of the information should be available for the government's investigation and prosecution of respondent.

II. A DEFENDANT'S PRODUCTION OF ORDINARY BUSINESS RECORDS IN SPECIFIED CATEGORIES DOES NOT IMPLICATE THE FIFTH AMENDMENT WHEN THE DEFENDANT'S POSSESSION OF RECORDS OF THE SPECIFIED CATEGORIES IS A FOREGONE CONCLUSION

The discussion in Point I proceeds on the assumption that the subpoena in this case in fact compelled a testimonial communication of sufficient substance to implicate the Fifth Amendment. In our view, however, that assumption is incorrect: Whatever testimonial communications may have been implicit in respondent's act of production, none were of sufficient significance to implicate the Fifth Amendment. Thus, the lower court's analysis of this second, more fact-specific issue is inconsistent with the analysis of the Court in *Fisher*, the only case in which the Court previously has analyzed the question. On this ground, as well, the court of appeals's error warrants reversal.

As we explain in Point I, *Fisher*'s analysis of the taint question discussed above was, strictly speaking, dictum.

The reason, of course, is that the Court concluded that the trivial testimonial communications compelled by enforcement of the subpoena in that case did not implicate the privilege against self-incrimination. *Fisher*—like this case—involved a standard subpoena seeking ordinary and customary business records. 425 U.S. at 394.[11] Compulsion of testimony by such a subpoena, the Court held, did not compel testimonial communications that implicated the privilege against self-incrimination. The Court reasoned:

> 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. The papers * * * are the kind usually prepared by an accountant working on the tax returns of his client. Surely the Government is in no way relying on the "truth-telling" of the taxpayer to prove the existence of or his access to the documents. The existence and location of the documents are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons no constitutional rights are touched. The question is not of testimony but of surrender. 425 U.S. at 411 (internal quotation and citations omitted).

Because the subpoena in this case, like the subpoena in *Fisher*, called only for specified categories of ordinary

---

[11] The *Fisher* subpoena sought "[a]ccountant's workpapers pertaining to Dr. E.J. Mason's books and records of 1969, 1970 and 1971," "[r]etained records of E.J. Mason's income tax returns for 1969, 1970 and 1971," and [r]etained copies of reports and other correspondence between [specified individuals] during 1969, 1970 and 1971," which were "analyses by the accountant of the taxpayers' income and expenses." 425 U.S. at 394. The subpoena in this case is in substance quite similar (albeit admittedly more verbose). J.A. 47-53.

business records, the decision in *Fisher* calls for the same conclusion here: The subpoena compelled respondent to make no communication that rises to the level of testimony within the protection of the Fifth Amendment. The court of appeals, however, strayed from that straightforward application of *Fisher*, concluding instead that the foregone-conclusion doctrine applies only when the government is "capable of demonstrating with reasonable particularity a prior awareness that the exhaustive litany of documents sought in the subpoena existed and were in [respondent]'s possession," Pet. App. 62a.

Nothing in *Fisher* suggests that the government must overcome so high a hurdle. Indeed, the Court's discussion in *Fisher* of handwriting exemplars strongly supports our understanding of the doctrine: A testimonial communication implicit in an act-of-production which admits something that normally is true and not inherently incriminating does not rise to the level of a testimonial communication protected by the Fifth Amendment.

In the key passage in *Fisher*, the Court explained: "When an accused is required to submit a handwriting exemplar he admits his ability to write and impliedly asserts that the exemplar is his writing. But in common experience, the first would be a near truism and the latter self-evident." *Fisher*, 425 U.S. at 411. Two things about that passage undermine the analysis of the court of appeals. First, it plainly extends the doctrine to generalities that are not necessarily true—there certainly are some people who cannot write, so the government necessarily obtains information by forcing a person to admit that he can. *See id.* (the compulsion in *Fisher* "adds *little* or nothing to the sum total of the Government's information") (emphasis added). Second, the passage suggests that a request for handwriting exemplars always would be

permissible, but not, as respondent would have it, because the government can make a defendant-specific factual showing of its advance knowledge of the defendant's compelled implicit testimonial admission of his ability to write. Rather, the *Fisher* Court suggests that compulsion is permissible because in the general run of cases it conveys nothing of significance to know that a defendant can write. The same reasoning governs this case, in which the compelled communication is an admission that respondent maintains several customary (and perfectly lawful) classes of business records.

The court of appeals nevertheless mischaracterized *Fisher* as a case in which the government "had highly specific knowledge as to the existence of the accountant's work papers as well as their location." Pet. App. 33a. But the Fisher Court's explanation of its decision does not mention any specific knowledge the government had about those papers; this is a remarkable situation if (as the court of appeals concluded) the decision turned on the government's possession of particularized knowledge of the subpoenaed documents. The error of the lower court's analysis is illuminated by its need to rely on the opinion of Justice Brennan (concurring only in the judgment) to support its view of the factual basis for the *Fisher* decision. *See* Pet. App. 37a (relying on government's knowledge of documents as reported in Justice Brennan's opinion, 425 U.S. at 430 n.9).

The court of appeals also erroneously suggested that its narrow reading of *Fisher* was justified by a retreat from *Fisher* in *Doe*. Pet. App. 34a-35a & 37a-39a n.24. The *Doe* opinion cannot bear the reading that the court of appeals attributes to it. The Court in *Doe* did briefly mention the lower court finding that the production there implicated the Fifth Amendment. The Court did not, how-

ever, affirmatively embrace that finding. Rather, it blandly noted that the finding "essentially rest[ed] on [the lower court's] determination of factual issues," 465 U.S. at 613-14, and then addressed the questions on which it had granted review. The Court's decision not to be diverted from those important questions by a review of the factual findings that those questions presupposed hardly suggests an intention to disavow or distinguish *Fisher*. *See* Pet. App. 105-a-106a (Williams, J., dissenting).

The dire consequences of the "reasonable particularity" standard adopted by the court of appeals cannot be overemphasized. That standard drains the "foregone conclusion" doctrine of all force just as surely as the automatic-taint rule criticized in Point I undermines *Fisher*'s rejection of *Boyd*. For all practical purposes, the identity of a document is determined by its contents. Only by its contents—what it says, not its shape, size, or texture—may a document be described with any particularity, for it is those contents that give the document significance. Thus, a standard requiring identification of a document with reasonable particularity is, in effect, a standard that demands advance knowledge of the contents of the documents.

In practice, the court of appeals has done in a more intricate way exactly what it criticized the district court for doing: Both decisions effectively require advance knowledge of the contents of a document as a predicate for lawful use of the document's contents. That is a daunting standard and, absent omniscience, one that few prosecutors are likely to meet. *Cf. United States v. R. Enterprises*, 498 U.S. 292, 297 (1991) (grand jury subpoenas need not be specific requests for relevant and admissible information; "the Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists"). The court of appeals's standard would have precluded respondent's prosecution here. Moreover, in practical effect, it puts documents beyond the normal reach of a grand jury subpoena. Because the standard has no basis in the language of the Fifth Amendment or the opinions of this Court, and because it is inconsistent with the Court's treatment of virtually identical facts in *Fisher*, the decision of the court of appeals cannot be sustained.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the district court for implementation of the plea agreement.

Respectfully submitted,

ROBERT W. RAY
Independent Counsel
PAUL ROSENZWEIG
Senior Litigation Counsel
DAVID G. BARGER
KARL N. GELLERT
Associate Independent Counsel
RONALD J. MANN
Consultant

November 1999