THE ACT-OF-PRODUCTION PRIVILEGE POST-*HUBBELL*: *UNITED STATES V. PONDS* AND THE RELEVANCE OF THE "REASONABLE PARTICULARITY" AND "FOREGONE CONCLUSION" DOCTRINES

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INTRODUCTION

The 2007 recession and the financial crisis that befell the nation in the summer and fall of 2008 resulted in a large task for federal investigators. Spurred by Congress and an outraged American public keen on determining how massive amounts of wealth were lost virtually overnight, investigators began a variety of criminal and civil probes.[1] Your client has been served with a subpoena for documents relating to his potential insider trading activities in connection with the recent financial crisis. The investigators seek to compel production of e-mails, calendar entries, and any other of your client's records that might relate to the investigation. Your client has confided to you that he has many of the requested records and that complying with the subpoena will therefore implicate him. He sits across your desk and asks, "I can't be forced to put the nails in my own coffin like this, can I?"

Your answer requires an analysis of the Fifth Amendment and its protections against being compelled to be a witness against oneself in any criminal case.[2] If your client complies with the subpoena, the act of producing the documents provides investigators with more information than is simply contained on the subpoena pages. This "act of production" is equivalent to your client's testimony that the documents exist, are authentic, and are in his possession. If the government grants your client immunity on

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[1] *See, e.g.*, Diana Henriques, *Madoff Scheme Kept Rippling Outward, Across Borders*, N.Y. TIMES, Dec. 20, 2008, at A1; Diana B. Henriques & Zachery Kouwe, *Prominent Trader Accused of Defrauding Clients*, N.Y. TIMES, Dec. 12, 2008, at A1; Ben White, *Investigators Said to Take Closer Look at Lehman*, N.Y. TIMES, Oct. 18, 2008, at B1; Carrie Johnson, *FBI Opens Probe of Finance Giants*, WASH. POST, Sept. 24, 2008, at D1; Evan Perez, *FBI Investigates Four Firms at Heart of the Mess*, WALL ST. J., Sept. 24, 2008, at A8.

[2] U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

the testimony conveyed by the act of production, must he still surrender the incriminating documents? Does it matter that the documents are well organized and it would take no special effort to supply them to prosecutors? How the courts will view the inherently testimonial character of complying with a subpoena for documents is the key variable in applying the "act-of-production" privilege under the Fifth Amendment. The applicable law pertaining to whether the act of producing documents in response to a subpoena is "testimony," and therefore implicates the Fifth Amendment, is not well settled. Fortunately for your client, the most recent cases in this line suggest that the analysis might not matter as much as attaining the correct result as a practical matter.

In July 2006, the United States Court of Appeals for the D.C. Circuit decided *United States v. Ponds*,[3] establishing a "reasonable particularity" standard to determine "whether an act of production is sufficiently testimonial to implicate the Fifth Amendment."[4] Relying on the 2000 Supreme Court precedent set forth in *United States v. Hubbell*,[5] the D.C. Circuit held that a witness's act of production can be privileged unless the government can establish its knowledge of the existence, possession, and authenticity of the documents with "reasonable particularity" such that the information inherently communicated by the act adds nothing to the case against the witness and can therefore be considered a "foregone conclusion."[6] The *Ponds* court further held that when the act of production is privileged, the scope of immunity extends beyond the act of production itself and encompasses the contents of the documents as well, reasoning that unless the government knows what they are looking for and knows who has it, they may not use "fishing expeditions" to build their case.[7] *Ponds* is an important warning to defenders of the Fifth Amendment. The future application of the "reasonable particularity" standard adopted by the D.C. Circuit will determine whether the broad Fifth Amendment protections only recently afforded to acts of production will survive beyond *Hubbell*.

This Note argues that the result in *Ponds* is correct, but not for the reasons expressed in the D.C. Circuit's opinion. By misunderstanding the holding of *Hubbell*, the *Ponds* court focused too much on the prior knowledge of the government and too little on the actual testimonial character of the production itself. This led to a myopic opinion, as the *Ponds* court strained to draw parallels between the subpoenas in the two cases that were not supported by the underlying facts. By doing so, the *Ponds* court missed a chance to strengthen the Fifth Amendment protections pronounced in *Hubbell* by failing to focus on the testimonial nature of responding to any

3 454 F.3d 313 (D.C. Cir. 2006).

4 *Id.* at 320.

5 530 U.S. 27 (2000).

6 *Ponds*, 454 F.3d at 324.

7 *Id.* at 327.

criminal subpoena. This approach threatens to muddy the waters for future application of the *Hubbell* doctrine as other circuits look to the D.C. Circuit's analysis as a guidepost. Part I provides the legal context to *Hubbell* and *Ponds* and briefly discusses the key issues and arguments in *Ponds.* Part II discusses the two paradigms through which these cases view the act-of-production privilege—focusing on the prior knowledge of the government and focus on the testimonial nature of what the target must do to comply with a subpoena duces tecum. Part III criticizes the approach of the *Ponds* court and suggests an alternative understanding of the testimonial nature inherent in the act of production that, while more consistent with an originalist view of the Fifth Amendment, threatens to strictly limit the use of subpoenas against those that are the targets of prosecution. Part IV explores the future implications to criminal defendants, prosecutors, and the courts of a policy limiting the government's subpoena power and favoring greater reliance on search warrants.

I. BACKGROUND: A BRIEF HISTORY OF THE ACT-OF-PRODUCTION PRIVILEGE

A. Boyd v. United States—*All Personal Papers Protected*

The Supreme Court first used the Fifth Amendment privilege to limit prosecutorial powers in 1886 in *Boyd v. United States.*[8] In *Boyd*, the prosecution accused Boyd of fraudulently avoiding import duties on thirty-five cases of plate glass.[9] To inform their case, the government required specific information as to the quantity and value of the glass, so they obtained a court order requiring Boyd to produce shipping invoices for identical glass he had previously imported.[10] Under the charged statute, failing to produce the invoices would be considered a legal confession, so Boyd complied with the order under protest that it violated his right against self-incrimination.[11] The government then used the compelled evidence as proof against Boyd, who was subsequently convicted.[12] Boyd appealed his conviction, arguing that the statute that compelled him to produce the invoices violated his Fifth Amendment right against self-incrimination.[13]

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8 Boyd v. United States, 116 U.S. 616, 634 (1886); Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 39 (1986) ("*Boyd* was also the Supreme Court's first significant case involving the fourth amendment or the fifth amendment privilege.").

9 *Boyd*, 116 U.S. at 618.

10 *Id.*

11 *Id.* at 618, 620.

12 *Id.* at 618.

13 *Id.*

The Supreme Court harshly criticized the statute as an unconstitutional government attempt to "extort from the party his private books and papers to make him liable for a penalty or to forfeit his property."[14] The *Boyd* Court held that the compulsory production of private papers violated the Fifth Amendment privilege, stating "we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."[15] The *Boyd* majority found Fourth and Fifth Amendment issues intertwined, holding that even a search warrant could not compel a man to surrender his private documents.[16] Two concurring justices found only a Fifth Amendment violation,[17] making the holding a unanimous cementing of the strength of the Fifth Amendment right against self-incrimination.

B. Fisher v. United States—*Document Contents Not Protected, Only the Act of Production*

The Supreme Court's 1976 opinion in *Fisher v. United States*[18] marked a major break from the *Boyd* conception of the privilege afforded to private papers and significantly narrowed the scope of the privilege.[19] In *Fisher*, the Court examined the government's attempt to subpoena personal records in a tax evasion case. At issue were personal tax documents, prepared by the taxpayer's accountant, and the government subpoena to acquire them from the taxpayer's attorney.[20] The taxpayer argued that the compelled production of the documents violated his Fifth Amendment privilege.[21]

The *Fisher* Court rejected the claim of privilege and held that the privilege did not protect the records for two reasons. First, the *Fisher* Court found that, because the accountant prepared the documents, the taxpayer could not testify as to their authenticity and therefore incriminate himself.[22] In fact, the Court noted, "enforcement [of the subpoena] against a taxpayer's lawyer would not 'compel' the taxpayer to do anything and certainly would not compel him to be a 'witness' against himself."[23] Second, the *Fisher* Court pronounced that the Fifth Amendment privilege was not

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14 *Id*. at 624.

15 *Boyd*, 116 U.S. at 633.

16 *Id*. at 624.

17 *See id.* at 638-41 (Miller, J., Waite, C.J., concurring).

18 425 U.S. 391 (1976).

19 Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After* United States v. Hubbell*—New Protection for Private Papers?*, 29 AM. J. CRIM. L. 123, 143 (2002).

20 *Fisher*, 425 U.S. at 394.

21 *Id*. at 396.

22 *Id*. at 413.

23 *Id*. at 397.

meant to protect the contents of voluntarily created documents,[24] however incriminating those contents might be.[25]

While this narrower conception of the privilege marked a major break from the expansive protection announced in *Boyd*,[26] which had concluded that private documents could not be seized even under a search warrant,[27] the *Fisher* Court did not leave private documents wholly unprotected from a government subpoena.[28] Looking to the text of the Fifth Amendment, the *Fisher* Court focused on the compelled "testimony" as the important factor to analyze, rather than the contents of the document.[29] The *Fisher* Court's holding that "[t]he act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced"[30] became the cornerstone of the "act-of-production" doctrine.[31]

The *Fisher* Court recognized that the discrete act of compliance with a subpoena "tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer" and indicates the "taxpayer's belief that the papers are those described in the subpoena."[32] The Court further

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24 *Id*. at 409-10 ("[T]he preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else."); *see also* Aaron M. Clemens, *The Pending Reinvigoration of* Boyd*: Personal Papers Are Protected by the Privilege Against Self-Incrimination*, 25 N. ILL. U. L. REV. 75, 84 (2004).

25 *Fisher*, 425 U.S. at 410 ("The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.").

26 *Fisher* was not the first limitation on the broad Fifth Amendment protections pronounced in *Boyd*. In the ninety years between the cases, the Supreme Court issued several opinions that chipped away at the *Boyd* Court's holding by limiting its application only to private individuals and finding that most business ties disqualified a person from exercising the privilege. *See* Clemens, *supra* note 24, at 81-83; *see also* Couch v. United States, 409 U.S. 322, 328 (1973) (surrendering documents to a third party voids the privilege which is merely intended to protect against the "extortion of information from the accused himself"); Wilson v. United States, 221 U.S. 361, 384-85 (1911) (holding that corporate officer must turn over corporate records even though the investigation is focused on the officer in his personal capacity).

27 Boyd v. United States, 116 U.S. 616, 622 (1886) ("It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects [sic] the sole object and purpose of search and seizure."); *see* Clemens, *supra* note 24, at 84.

28 Clemens, *supra* note 24, at 84.

29 *Fisher*, 425 U.S. at 401 ("We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against 'compelled self-incrimination, not [the disclosure of] private information.'" (quoting United States v. Nobles, 422 U.S. 225, 233 n.7 (1975))).

30 *Id*. at 410; *see* Cole, *supra* note 19, at 146.

31 Cole, *supra* note 19, at 146.

32 *Fisher*, 425 U.S. at 410 (citing Curcio v. United States, 354 U.S. 118, 125 (1957)).

held that when these communicative, "testimonial" aspects are incriminating, the act of production is privileged under the Fifth Amendment.[33] The *Fisher* Court held that there are three situations when the act of production of documents is testimonial and can implicitly communicate incriminating facts beyond their contents. The Court held that the act of production is testimonial when it (1) concedes the existence of a document unknown to the government; (2) concedes the possession or location of the document unknown to the government; or (3) assists the government in authentication of a document.[34]

The application of this test in *Fisher*, however, left more questions than answers with regard to the protection of documents in future subpoena cases.[35] The *Fisher* Court easily disposed of the issue on the facts of the case because the government already knew that the documents existed and who had them.[36] This led the *Fisher* Court to hold that "[t]he 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."[37] This holding essentially created the "foregone conclusion" doctrine[38] that has endured in this line of cases with various levels of import.[39]

Fisher, which in future cases saw its holding expanded to apply to private papers within the possession and control of the individual, has been described by Justice O'Connor as "sound[ing] the death-knell for *Boyd*," making it clear "that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind."[40] The *Fisher* Court's

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33 *Id.*

34 *Id.* at 410-13; *see* Clemens, *supra* note 24, at 85.

35 Cole, *supra* note 19, at 146. While the Court explained that the act of production could serve as testimony of the existence, location, and authenticity of the documents, the specific circumstances in *Fisher* led to a very narrow decision. *See id.* The *Fisher* Court stated that whether the act of production was testimonial would "depend on the facts and circumstances of particular cases or classes thereof," and because the subpoenaed documents were in the possession of a third party and the government already knew of their existence and location, it was able to easily dispose of the case by creating the foregone conclusion exception. *Fisher*, 425 U.S. at 410; *see also* Cole, *supra* note 19, at 146-47.

36 *Fisher*, 425 U.S. at 411.

37 *Id.*

38 *See* Cole, *supra* note 19, at 146. Cole notes that, while the foregone conclusion doctrine applied well to the unusual facts of *Fisher*, it left open the question of "whether the Fifth Amendment would protect the act of production of documents in the more typical case in which a witness is subpoenaed to produce his or her own 'private papers.'" *Id.* at 147. The *Fisher* Court specifically chose not to reach this question. *Fisher*, 425 U.S. at 414. This question was answered in the affirmative seven years later when the Court applied the *Fisher* ruling to individuals in possession of their own papers, holding that while the contents of an individual's voluntarily prepared records are not protected by the privilege, the act is privileged when it "would involve testimonial self-incrimination." United States v. Doe, 465 U.S. 605, 613-14 (1984).

39 *See infra* Part II.

40 *Doe*, 465 U.S. at 618 (O'Connor, J., concurring).

ruling created three distinct ways in which the act of production could be testimonial and the somewhat vague "foregone conclusion" analysis to determine whether the value of that testimony implicated the Fifth Amendment privilege.[41]

Twenty-four years later, in *United States v. Hubbell*, the Court decided that "testimony" was broader than the boundaries set in *Fisher* and it addressed the question of privileged contents anew.[42]

C. United States v. Hubbell—*The Act-of-Production Privilege is Strengthened*

In *Hubbell*, the Supreme Court strengthened the act-of-production privilege by expanding its view of the testimonial character of complying with a government subpoena for documents under a grant of immunity for the act itself. *Hubbell* arose out of Independent Counsel Kenneth Starr's second prosecution of Webster Hubbell resulting from his investigation of possible violations of federal law relating to the Whitewater Development Corporation.[43] The first prosecution had been terminated by Hubbell's plea bargain, in which he pleaded guilty to mail fraud and tax evasion charges.[44] In addition, Hubbell promised to provide Starr with "full, complete, accurate, and truthful information" about matters relating to the Whitewater investigation.[45] The second prosecution was to determine if Hubbell had violated that promise.[46]

In service of his investigation, Starr served Hubbell with a broad subpoena duces tecum calling for personal papers relating to eleven broad categories of documents.[47] Hubbell invoked his Fifth Amendment privilege and refused to produce the documents.[48] The district court granted immunity over the act of production and directed Hubbell to produce the documents.[49] Hubbell produced over thirteen thousand pages of documents and records responsive to the subpoena, the contents of which directly provided the Independent Counsel with the information that led to the second prosecution of Hubbell in this case for various tax-related crimes.[50] The Supreme Court granted certiorari "in order to determine the precise scope of a grant

41 *See Fisher*, 425 U.S. at 410-13.

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

43 *Id.* at 30.

44 *Id.*

45 *Id.*

46 *Id.* at 30-31.

47 *Id.* at 31.

48 *Hubbell*, 530 U.S. at 31.

49 *Id.*

50 *Id.* at 31-32.

of immunity with respect to the production of documents in response to a subpoena."[51]

The *Hubbell* Court framed the key issue with regard to grants of act-of-production immunity as whether they "pose a significant bar" to prosecution.[52] Since the scope of the immunity granted was "'coextensive with the scope of the constitutional privilege,' the real issue was the scope of the Fifth Amendment privilege" with regard to the act of production.[53] In other words, when does the use of a document's contents touch the testimonial aspect of the act of production? The *Hubbell* Court found it obvious that the prosecution's use of evidence relating to Hubbell's response to the subpoena would "surely be a prohibited 'use' of the immunized act of production."[54] The Court went further, however, and found that the government had obviously "already made 'derivative use' of the testimonial aspect of that act in obtaining the indictment against respondent and in preparing its case for trial."[55]

The *Hubbell* Court found that the government needed "[Hubbell's] assistance both to identify potential sources of information and to produce those sources," and that compliance with the broad subpoena was "tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents."[56] Although the *Hubbell* Court asserted its agreement with the *Fisher* holding that the contents of the documents were not protected,[57] it held that it was "undeniable" that the act could provide a prosecutor with a "lead to incriminating evidence, or a link in the chain of evidence needed to prosecute."[58] Because the produced sources eventually led to the indictment against Hubbell, it was "abundantly clear that the testimonial aspect of [Hubbell's] act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution."[59]

The *Hubbell* Court went on to expand the scope of the act-of-production privilege in two important ways. First, it rejected the government's "manna from heaven"[60] approach to dealing with the privileged act thereby attaching derivative use of the contents of produced documents to

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51 *Id.* at 34.

52 *Id.* at 33-34.

53 Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 284 (2004) (quoting *Hubbell*, 530 U.S. at 38).

54 *Hubbell*, 530 U.S. at 41 (citing *In re* Sealed Case, 791 F.2d 179, 182 (D.C. Cir. 1986)).

55 *Id.*; Allen & Mace, *supra* note 53, at 284.

56 *Hubbell*, 530 U.S. at 41.

57 *See id.* at 36 n.18 (quoting United States v. Doe, 465 U.S. 605, 611-12 (1984)).

58 *Id.* at 42 (internal quotation marks omitted); Allen & Mace, *supra* note 53, at 284.

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

60 *Id.* ("The documents did not magically appear in the prosecutor's office like 'manna from heaven.'").

the conception of "testimony."[61] The "manna from heaven" approach had been employed in the past to allow the government to make use of the contents of the produced documents as long as the act of production was not introduced into evidence.[62] The *Hubbell* Court analyzed the conduct necessary to comply with the subpoena and found that "[i]t was only through [Hubbell's] *truthful* reply to the subpoena that the Government received the incriminating documents . . . that led to the indictment."[63] This truth-telling component, the "extensive use of the contents of '[Hubbell's] own mind'" in identifying and distinguishing the documents responsive to the subpoena,[64] was recognized by the *Hubbell* Court as testimonial in nature and therefore privileged.[65] This was a dramatic change from *Fisher*, which required a much greater use of the respondent's knowledge for the privilege to apply and did not protect any derivative use of the information gained by the testimonial act of production.[66]

The second way *Hubbell* expanded the scope of the act-of-production privilege was by weakening the usefulness of the "foregone conclusion" doctrine as pronounced in *Fisher*.[67] The *Hubbell* Court compared the subpoenas in *Fisher* and *Hubbell*, and the differences were so stark as to place any subpoena not supported by the government's complete knowledge of the existence, location, and authenticity of the documents requested outside the "foregone conclusion" rationale.[68] The Court found that

> [w]hile in *Fisher* the Government already knew that the documents were in the attorneys' possession and could independently confirm their existence and authenticity through the accountants who created them, [in Hubbell] the Government has not shown that it had *any* prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by [Hubbell].[69]

The *Hubbell* Court was especially dismissive of the "foregone conclusion" rationale, flatly stating that "[t]he Government cannot cure this deficiency through the overbroad argument that a businessman such as [Hubbell] will always possess general business and tax records"[70] and that "[w]hatever the scope of this 'foregone conclusion' rationale, the facts of this case plainly fall outside of it."[71] The *Hubbell* Court thus limited the "foregone conclu-

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61 Allen & Mace, *supra* note 53, at 286.

62 *See Hubbell*, 530 U.S. at 43; Cole, *supra* note 19, at 166.

63 *Hubbell*, 530 U.S. at 42-43 (emphasis added and internal quotation marks omitted).

64 *Id*. at 43.

65 *Id*. ("The assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox.").

66 Allen & Mace, *supra* note 53, at 285.

67 *See generally Hubbell*, 530 U.S. at 44; *see also* Cole, *supra* note 19, at 167-68.

68 *Hubbell*, 530 U.S. at 44-45.

69 *Id*.

70 *Id*. at 45.

71 *Id*. at 44.

sion" doctrine to cases where the government knew of the existence, location, and authenticity of documents such that the act of production would add nothing to the government's case against the respondent.[72]

Justice Thomas's concurrence, in which Justice Scalia joined, explores an originalist interpretation of the text of the Fifth Amendment. Using dictionaries published around the time of the framing, Thomas defines "witness" as "someone who 'gives evidence in a cause.'"[73] This understanding of the word "witness" would include the contents of the documents produced and suggest a rule much closer to the holding in *Boyd* that the "Fifth Amendment protects a defendant against compelled production of books and papers" rather than only protecting the "testimonial" aspects of the act of production itself.[74] Based on this conception of the Fifth Amendment, Justice Thomas believed that the Fifth Amendment's prohibition against self-incrimination might have an even broader reach than in *Fisher* and *Hubbell*, and he left open the possibility of revisiting the issue in a future case.[75]

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[72] Allen & Mace, *supra* note 53, at 288. There are differing scholarly views as to the importance of the foregone conclusion rationale to the *Hubbell* holding and to the future application of the act-of-production privilege. *Id.* at 287-89. Some scholars view the foregone conclusion doctrine as the key, essentially linking the level of prior government knowledge of the documents to the testimony inherent in the act of producing them. *See* Cole, *supra* note 19, at 184 (explaining that whether an act of production has sufficient testimonial value to be protected by the Fifth Amendment depends on whether the government had prior knowledge of the information conveyed such that it is a foregone conclusion); Robert P. Mosteller, *Cowboy Prosecutors and Subpoenas for Incriminating Evidence: The Consequences and Correction of Excess*, 58 WASH. & LEE L. REV. 487, 509 (2001) (explaining that when the government already knows all of the information implicitly conveyed by the act of production, the foregone conclusion doctrine limits the act of production to "surrender or delivery of a document rather than communication about it" and thus obviates the Fifth Amendment concern). Professors Cole and Mosteller agree that the Supreme Court has never provided a definitive answer to the question of how the doctrine should be applied in practice. Cole, *supra* note 19, at 169; Mosteller, *supra*, at 508-09. Professor Cole argues that, after *Hubbell*, it is clear that "if the government requires assistance from the witness in identifying and assembling the [subpoenaed documents], then it cannot meet its prior knowledge burden." Cole, *supra* note 19, at 184. Professor Cole recognizes, however, that the Court has given no guidance on how the foregone conclusion rationale would apply to a situation in which the government had some prior knowledge and the target asserts the act-of-production privilege. *Id.* at 184-85 (explaining that future courts will have to decide how to apply the foregone conclusion rationale to this scenario). Professor Mosteller takes a different approach, asserting that the foregone conclusion doctrine demands that the government have complete knowledge of the information conveyed by the act of production and must be diluted to avoid eliminating the utility of subpoenas on targets. Mosteller, *supra*, at 509-10. Allen and Mace suggest a different view, examining the foregone conclusion doctrine from the viewpoint of the amount and quality of the witness's cognitive efforts used to comply with a subpoena rather than the government's prior knowledge. Allen & Mace, *supra* note 53, at 288-89; *see infra* Part II.

[73] *Hubbell*, 530 U.S. at 50 (Thomas, J., concurring) (quoting 2 GILES JACOB, A NEW LAW-DICTIONARY 134 (London, T. Osborne 8th ed. 1762), and citing various other dictionaries published between 1762 and 1828).

[74] *Id.* at 55-56.

[75] *Id.* at 56.

In sum, the *Hubbell* Court's analysis of whether the act of production was sufficiently testimonial was not focused on what the government knew or did not know—rather it was focused on the conduct required of the respondent to comply and the attendant use of his faculties to do so.[76]

D. United States v. Ponds—*Establishing the Scope of Fifth Amendment Protection with the "Reasonable Particularity" Test*

In *United States v. Ponds*,[77] the United States Court of Appeals for the D.C. Circuit established a different standard from the *Hubbell* Court for determining "whether an act of production is sufficiently testimonial to implicate the Fifth Amendment."[78] The *Ponds* court, claiming to follow the Ninth Circuit's standard,[79] applied a "reasonable particularity" standard despite the fact that the *Hubbell* Court had declined to adopt this standard in affirming the D.C. Circuit's decision in *Hubbell* below.[80] Under this standard, once the witness has been granted immunity on the act of production and complied with a subpoena, the burden falls on the government to "establish its [pre-subpoena] knowledge of the existence, possession, and authenticity of subpoenaed documents with 'reasonable particularity' before the communication inherent in the act of production can be considered a foregone conclusion."[81] The *Ponds* court thus took a step back toward *Fisher* by focusing on the particularity of the government's knowledge rather than the testimony implicit in the act of production.

The facts of the *Ponds* case are simple. Navron Ponds was a criminal defense attorney who represented a drug dealer named Jerome Harris.[82] As a retainer, Mr. Harris's mother gave Ponds a Mercedes Benz 500SL, which he registered in his sister's name.[83] After Mr. Harris pled guilty, the court

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76 *See* Allen & Mace, *supra* note 53, at 288-89.

77 454 F.3d 313 (D.C. Cir. 2006).

78 *Id.* at 320-21.

79 *Id.* (citing *In re* Grand Jury Subpoena, Dated Apr. 18, 2003, 383 F.3d 905, 910 (9th Cir. 2004)).

80 *Id.* The Supreme Court heard *Hubbell* after the D.C. Circuit remanded the case back to the district court because, although the district court had come to the correct conclusion by dismissing the indictment, it had focused its analysis on the incriminating contents of the documents produced rather than the use of the incriminating "testimony" inherent in the act of production. *See Hubbell*, 530 U.S. at 30-34 (majority opinion).

81 United States v. Hubbell, 167 F.3d 552, 579 (D.C. Cir. 1999). The D.C. Circuit in *Ponds* refers often to its own opinion in *Hubbell*, often treating those conclusions as if they were adopted by the Supreme Court in its *Hubbell* decision. *See Ponds*, 454 F.3d at 320 (noting that although the Supreme Court did not adopt the "reasonable particularity" standard in affirming the D.C. Circuit's opinion in *Hubbell*, the Court did find that "the applicability of the Fifth Amendment turns on the level of the government's prior knowledge").

82 *Ponds*, 454 F.3d at 316.

83 *Id.*

asked Ponds about the whereabouts of the car.[84] Ponds did not mention the transfer.[85] When the U.S. Attorney's Office for the District of Maryland later learned of the transfer from Mr. Harris, it began a grand jury investigation of Ponds "and his failure to reveal his possession of the car to the court."[86] Maryland federal investigators executed a search warrant for Mr. Harris's jail cell and found the retainer agreement for the car.[87] The investigation led the investigators to Ponds's apartment complex where they learned that Ponds drove the Mercedes[88] and that he parked the car in his assigned parking space.[89]

Maryland federal prosecutors issued a subpoena ordering Ponds to produce seven categories of documents, including documents "[r]eferencing use, ownership, possession, custody and/or control of a white Mercedes Benz."[90] Ponds invoked the Fifth Amendment act-of-production privilege.[91] The government granted act-of-production immunity like in *Hubbell*, and Ponds complied with the subpoena.[92] Maryland prosecutors also filed an application with the Maryland federal district court to gain access to Ponds's 1996 and 1997 federal tax returns and discovered that Ponds had not filed tax returns for those years.[93] Maryland prosecutors then contacted their counterparts in the United States Attorney's Office for the District of Columbia about initiating a tax investigation.[94] Along with the information concerning Ponds's non-payment of taxes, Maryland prosecutors shared documents produced by Ponds and transcripts from the Maryland grand jury and eventually D.C. prosecutors indicted Ponds on tax evasion and wire fraud charges.[95] Ponds, relying on *Hubbell*, argued that this prosecution was an unconstitutional use of his privileged testimony, the contents of his mind that he used to interpret and comply with the subpoena.[96] The district court, however, found that the subpoena was "narrow and specific, and reflected that the government already knew of the existence of the types of documents sought and their possession by defendant,"[97] thus vitiating

84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.* at 317.
88 *Ponds*, 454 F.3d at 317.
89 *See id.*
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.* at 317-18.
94 *Ponds*, 454 F.3d at 318.
95 *Id.*
96 *Id.* at 324.
97 *Id.* (quoting United States v. Ponds, 290 F. Supp. 2d 71, 82 (D.D.C. 2003)).

Ponds's claimed privilege. Ponds was convicted and appealed to the D.C. Circuit.[98]

The D.C. Circuit began its analysis of the two basic questions relating to grants of act-of-production immunity under the Supreme Court's holding in *Kastigar v. United States*[99] by asking: (1) "Was [Ponds's] act of producing the documents sufficiently testimonial that the Fifth Amendment privilege [was] implicated"; and "(2) [i]f so, did the government violate [his] Fifth Amendment rights (and the court order granting him immunity) by using sources of information derived from the immunized testimony in the prosecution?"[100]

With regard to the first question, the D.C. Circuit in *Ponds* understood the key holding of the *Hubbell* Court to be that "[w]hether an act of production is sufficiently testimonial to implicate the Fifth Amendment . . . depends on the government's knowledge regarding the documents before they are produced."[101] With its focus on the government's prior knowledge, à la *Fisher*, the *Ponds* court examined the breadth of the categories of subpoenaed documents[102] and adopted a "reasonable particularity" test to determine the requisite government knowledge necessary to vitiate the act-of-production privilege.[103]

The *Ponds* court found most of the subpoena categories overbroad, including the request for documents relating to the ownership and possession of the Mercedes Benz.[104] Although the government knew that Ponds had been paid with the car, that he registered it in his sister's name, that he drove it, and that it was parked outside his home, the *Ponds* court determined that the request was nevertheless overbroad.[105] The court found that the "government did not know 'whether or not' documents relating to the

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98 *Id*. at 318.

99 406 U.S. 441 (1972).

100 *Ponds*, 454 F.3d at 319. In *Kastigar*, the Supreme Court explained that although the scope of a grant of act-of-production immunity is coextensive with the Fifth Amendment privilege, it does not necessarily follow that the witness could never be prosecuted. *Kastigar*, 406 U.S. at 453. The Court made clear that act-of-production immunity was to extend to the derivative use by prosecutors of any of the materials obtained either in court or in subsequent investigations, but that the government could nevertheless prosecute the immunized target if it could subsequently prove that sufficient evidence was obtained separately and without resort to the immunized materials. *See id.* at 459-60.

101 *Ponds*, 454 F.3d at 320, 324.

102 *Id*. at 325-26.

103 *Id*. at 320-21.

104 *Id*. at 325. The *Ponds* court also found overbroad the request for "[r]ecords of employees of the law Office of Navron Ponds." *Id.* at 317, 326. The *Ponds* court reasoned that the construction of the sentence, as it referred to plural "employees," combined with the prosecutor's uncertain recollection of whether she had ever spoken to such an employee, demonstrated that the government had insufficient knowledge of the existence of employees and therefore insufficient knowledge of any employee-related documents. *Id.* at 326.

105 *Id*. at 317, 325.

car existed or were in Ponds' possession."[106] It further concluded that the act of producing those records "testified to their existence and his possession, which effectively communicated that he had long been the beneficial owner of the car."[107]

Because the government could not show "with reasonable particularity that it had prior knowledge of the existence and location of many of the subpoenaed documents" such that their existence and location would be a "foregone conclusion," the *Ponds* court held that the act of production was "'testimony' rather than mere 'surrender.'"[108] Having answered this key question, the *Ponds* court proceeded to consider the second question under *Kastigar* and found that prosecutors had made derivative use of the testimony, which led to the indictment at issue.[109] The D.C. Circuit therefore reversed the conviction below.[110]

II. WHAT TELLS US MORE ABOUT TESTIMONY: WHAT THE GOVERNMENT KNOWS OR WHAT THE TARGET MUST PRODUCE?

The focus of *Ponds* and *Fisher* on prior government knowledge of the existence, location, and authenticity of the subpoenaed documents invites courts down a complicated and twisted road of analysis with unacceptable results.[111] It is only within this paradigm that the vague and difficult to ap-

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106 *Id*. at 325.

107 *Ponds*, 454 F.3d at 325.

108 *Id*. at 327.

109 *Id*. at 316.

110 *Id*.

111 Because the Supreme Court has not specifically defined how much government knowledge is sufficient to sidestep the act-of-production privilege, courts considering the doctrine through the prism of prior government knowledge will be forced to invent law on a case-by-case basis. *See supra* note 72. Professor Allen argues that if the analysis hinges on prior government knowledge then "the government could presumably compel oral confessions if it had other evidence of what the defendant knew or would say." Allen & Mace, *supra* note 53, at 288. Professor Allen illustrates his point with a hypothetical situation involving an accused murderer and a compelled polygraph test. *Id*. at 248-49. The accused is asked question after question and refuses to answer, but the polygraph operator is able to chart his physiological responses to the investigators' increasingly specific questions. *Id.* This method allows investigators to arrive at a specific location which police then search and find the victim's body. *Id.* Professor Allen's example shows clear compulsion and incrimination, but he points out that only one conception of "testimony" is consistent with the "perhaps universal agreement that the actions of the [investigators] violate the Fifth Amendment." *Id.* at 249. He suggests that the answer is that "testimony' is the substantive content of cognition" and that failure to recognize that testimony is any communication derived from a subject's cognitive efforts has led to the inability of Justices and theorists to pronounce a coherent explanation of the testimonial scope of act-of-production doctrine cases. *See id.* at 250. If the foregone conclusion doctrine is understood to allow the government to compel information if the government is already nearly certain of the information's existence, then presumably there would be "no violation [in the above hypothetical] if the government already had the [victim's] body and substan-

ply "reasonable particularity" and "foregone conclusion" doctrines announced in these cases are necessitated. The Supreme Court in *Hubbell* embraced neither doctrine.[112] Instead, by focusing the analysis on what compliance with a subpoena requires from the target in terms of action and cognition, courts can apply the act-of-production doctrine consistently with *Hubbell* and *Fisher* without resorting to the "reasonable particularity" or "foregone conclusion" tests and without the need to invent alternative doctrines to address their scope.[113]

The *Hubbell* Court ignored the "reasonable particularity" limitation expressed by the D.C. Circuit in its decision below.[114] The *Hubbell* Court decided the case from a completely different vantage point, focusing on the scope of the testimony inherent in an act of production.[115] With regard to *Fisher*'s "foregone conclusion" doctrine,[116] revived in the D.C. Circuit by *Ponds*,[117] the *Hubbell* Court merely stood by the narrow holding in *Fisher* that when the government knows of the existence and location of the documents they seek, then the act of production adds nothing to the government's case.[118] This is a truism and especially common: verifiable knowledge of documents' existence and location, unlike suspicion, is even enough to satisfy the Fourth Amendment's requirements for a search warrant.[119]

Unfortunately, the focus on what the government knows avoids the real issue pronounced by the Supreme Court in *Hubbell*: What is the actual testimony that the Fifth Amendment protects?[120] The "reasonable particularity" doctrine by definition allows a prosecutor who is less than certain as to a document's existence or whereabouts to have a fighting chance at compelling its production outside the scope of the act-of-production privilege. If a prosecutor can convince a judge that the privilege does not apply without demonstrating that he knew of the document's existence and location, this necessarily compels the respondent's testimony to the extent that it con-

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tial evidence of [the accused's] guilt, but merely wanted to solidify the case against him or be able to present more dramatic evidence to the jury." *Id.* at 288.

112 *See* United States v. Hubbell, 530 U.S. 27, 44-45 (2000); *Ponds*, 454 F.3d at 320.

113 *See supra* note 72.

114 *See Hubbell*, 530 U.S. at 44-45; *Ponds*, 454 F.3d at 320.

115 *See Hubbell*, 530 U.S. at 34 ("[W]e granted the Independent Counsel's petition for a writ of certiorari in order to determine the precise scope of a grant of immunity with respect to the production of documents in response to a subpoena.").

116 Fisher v. United States, 425 U.S. 391, 411 (1976) (citing *In re* Harris, 211 U.S. 274, 279 (1911)).

117 *Ponds*, 454 F.3d at 319.

118 *Hubbell*, 530 U.S. at 44.

119 *See* Cole, *supra* note 19, at 170-72 (discussing Fourth Amendment search warrant requirements).

120 *See Hubbell*, 530 U.S. at 29 ("The two questions presented concern the scope of a witness' protection against compelled self-incrimination . . . .").

firms the prosecution's guess, however educated it might be. Anything less than knowledge is, at its core, a guess, and it seems at odds with *Hubbell* to suggest that anything less than full knowledge would fall outside of the *Hubbell* Court's broadened scope of testimony inherent in the act of production.[121]

If the government is 100 percent certain that the documents they seek exist and are in the possession of the target of an investigation, or even within striking distance, then this will most likely rise to the level of probable cause necessary to obtain a search warrant.[122] In the event that the government can get a search warrant, adopting standards that allow the prosecution to avoid making the necessary showing to acquire one leads to an equity argument. Why should the target be subject to the inherent potential for abuse that exists with regard to subpoenas if a more traditional option exists that is more consistent with the target's Fifth Amendment rights?[123] A government subpoena is not simply a request for documents; it is a loaded weapon carrying with it the threat of contempt or perjury charges for noncompliance.[124] It seems inequitable to force the target of the investigation to acquiesce to these heavy-handed tactics when the courts have already recognized the inherent Fifth Amendment issue. Government investigators,

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121 *See id.* at 45 (noting that the government's lack of knowledge of the existence and whereabouts of the requested documents was a deficiency that could not be cured by any foregone conclusion rationale).

122 *See* Cole, *supra* note 19, at 170-72 (discussing Fourth Amendment search warrant requirements).

123 This rationale runs into problems when considered in the context of civil investigations and suits brought by government agencies. In a civil suit, the government may subpoena documents without regard for the strictures of the Fifth Amendment, which only applies to criminal cases. *See* U.S. CONST. amend. V. However, government agencies often work closely with the Department of Justice, sharing information gained in their civil investigations with federal criminal prosecutors. A target agrees to this sharing of information subpoenaed for a civil suit when he gives any type of testimony to the U.S. Securities and Exchange Commission. U.S. SEC. AND EXCH. COMM'N, SEC FORM 1662, SUPPLEMENTAL INFORMATION FOR PERSONS REQUESTED TO SUPPLY INFORMATION VOLUNTARILY OR DIRECTED TO SUPPLY INFORMATION PURSUANT TO A COMMISSION SUBPOENA 2 (2004), http://www.sec.gov/about/forms/sec1662.pdf. ("Information you give may be used against you in any federal, state, local or foreign administrative, civil or criminal proceeding brought by the Commission or any other agency."). Because of this necessary consequence of giving testimony, individuals may refuse to testify or respond to SEC subpoenas based on the Fifth Amendment act-of-production privilege. *Id.* ("You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment to the Constitution of the United States, to give any information that may tend to incriminate you or subject you to fine, penalty or forfeiture."). In this situation, a search warrant will not be an option in the civil case against the target, and the specter of a possible criminal investigation might increasingly lead to targets escaping civil investigations by claiming a Fifth Amendment privilege. I leave the subject of revising the rules governing the relationship between the government's civil enforcement agencies and the Department of Justice and the potential future ramifications of handicapping those civil enforcement agencies as an important area of concern deserving of its own separate analysis.

124 *See* Clemens, *supra* note 24, at 103 (discussing inherent potential for prosecutorial abuse with regard to subpoenas duces tecum).

however, continue to favor subpoenas over the search warrant process, thereby subjecting targets to contempt charges for not producing the very documents that might get them convicted of the initially alleged crimes.[125]

The "foregone conclusion" doctrine suffers from similar inadequacies. Some commentators believe that this doctrine is central to the issue,[126] but this conclusion seems unlikely based on dismissive treatment in *Hubbell*, which is widely understood to be the current state of the rule.[127] One scholar has suggested an alternative understanding of the post-*Hubbell* "foregone conclusion" doctrine that seems more consistent with the ruling in *Hubbell*.[128] Professor Allen proposes that the doctrine makes more sense "if it is understood as directed toward the witness's cognitive efforts rather than the government's knowledge."[129]

Focusing on the "testimony" that the Fifth Amendment seeks to protect, without consideration to what the government believes it knows, is a more reasonable paradigm from which to analyze the act-of-production privilege. The key question in *Hubbell* remains the only relevant issue: what is the scope of the testimony inherent in the act of responding to a subpoena?[130] The Supreme Court stated in *Hubbell* that the testimony inherent in the act of production was not merely the implicit communication of the documents' existence, location, or authenticity, but also the use of one's mind to distinguish the relevant documents from others that are not responsive to the subpoena.[131] Whether the request is broad or narrow, any "response that communicates a single proposition or a small amount of information is still functioning as testimony" provided it is compelled and incriminating.[132] For this reason, any cognitive effort used to comply with a subpoena for incriminating documents is within the scope of "testimony" pronounced in *Hubbell*.[133]

This conception is more consistent with the text of the Fifth Amendment as well, allowing courts to focus on "testimony" and "compulsion,"[134]

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125 *See infra* Part IV.

126 *See supra* note 72.

127 Allen & Mace, *supra* note 53, at 288. *But see* Cole, *supra* note 19, at 184-85 (suggesting that the foregone conclusion doctrine plays an important role in assessing the testimonial value of the act of production under *Hubbell*).

128 Allen & Mace, *supra* note 53, at 288-89.

129 *Id.* at 288; *see* Fisher v. United States, 425 U.S. 391, 429 (1976) (Brennan, J., concurring) ("I know of no Fifth Amendment principle which makes the testimonial nature of evidence, and therefore, one's protection against incriminating himself, turn on the strength of the Government's case against him.").

130 United States v. Hubbell, 530 U.S. 27, 34 (2000).

131 *Id.* at 43.

132 Michael S. Pardo, *Testimony*, 82 TUL. L. REV. 119, 185 (2007).

133 *See id.*

134 For a discussion of "compulsion" and the law defining it, see Allen & Mace, *supra* note 53, at 250-56.

rather than the uncertain shades of what the government knows and when they know it. The fact that some scholars are troubled that *Hubbell* signals a return to *Boyd*'s broad protection of private papers[135] cannot obscure the efficiency and simplicity of this approach.

III. ANALYSIS: *PONDS* IS RIGHT FOR THE WRONG REASON

The D.C. Circuit came to the correct holding in *Ponds*, but did not correctly apply the precedential holding of *Hubbell*. The *Ponds* court seemed preoccupied with *Hubbell*'s analysis of *Fisher*, and chose to distinguish *Ponds* based on prior government knowledge rather than the incriminating testimony implicit in the use of the contents of the respondent's mind.[136]

The problems with this *Fisher*-style analysis, relying on the "reasonable particularity" of the government's prior knowledge and the "foregone conclusion" doctrine, are several. First, the "foregone conclusion" doctrine does not apply cleanly or sensibly outside situations in which the government has complete knowledge of the existence and location of the subpoenaed documents. In *Fisher*, the doctrine cleanly disposed of the issue because the target of the subpoena was not the target of the investigation but rather a third party in possession of documents created by the target's accountant.[137] Because this was a third-party custodianship of documents that were created voluntarily and without compulsion, it is not very analogous to the facts in *Ponds* or *Hubbell*.

In *Hubbell*, the Supreme Court was dismissive of the "foregone conclusion" analysis of *Fisher*, and distinguished the cases by saying "[w]hatever the scope of this 'foregone conclusion' rationale, the facts of this case plainly fall outside of it."[138] The *Ponds* court should have relied on *Hubbell*'s holding and explanation of the inherent testimonial nature of the act of producing documents in response to a subpoena.[139] When the *Hubbell* Court stated that "[i]t was unquestionably necessary for respondent to make *extensive* use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the requests in the subpoena,"[140] it reinvigorated *Boyd* and strengthened the Fifth Amendment privilege.[141] The *Hubbell* ruling strongly suggests that any significant thought in responding to a sub-

135 *See, e.g.*, H. Richard Uviller, *Foreword:* Fisher *Goes on the Quintessential Fishing Expedition and* Hubbell *is Off the Hook*, 91 J. CRIM. L. & CRIMINOLOGY 311, 334 (2001) (noting the threat that such a broad conception of "testimony" poses to white collar criminal investigations).

136 United States v. Ponds, 454 F.3d 313, 320-21 (D.C. Cir. 2006).

137 Fisher v. United States, 425 U.S. 391, 409-10 (1976).

138 United States v. Hubbell, 530 U.S. 27, 44 (2000); Allen & Mace, *supra* note 53, at 288.

139 *Hubbell*, 530 U.S. at 41-43.

140 *Id.* at 43 (quoting Curcio v. United States, 354 U.S. 118, 128 (1957)); Allen & Mace, *supra* note 53, at 285.

141 *See* Clemens, *supra* note 24, at 95-96.

poena for incriminating documents may be used as a catch-all to immunize any request unless the government knows of the existence and location of the documents with certainty.[142]

In *Ponds*, the D.C. Circuit should have applied the rationale and holding of *Hubbell*. Such a holding would have taken a stand for the Fifth Amendment and for common sense. The *Ponds* court could have agreed that it is not within the conception of the Fifth Amendment to compel citizens to hand over incriminating documents just because the government asks. If we allow the government to compel private, incriminating documents with only a "reasonably particular" suspicion, then there is little to stop the government from similarly compelling oral testimony when it has convincing evidence making it sure of the target's guilt.[143]

Lastly, comparing the *Ponds* decision to the Ninth Circuit's decision in *In re Grand Jury Subpoena, Dated April 18, 2003*[144] illustrates how easy it might be for courts to abuse the discretion inherent in the "reasonable particularity" standard. In *In re Grand Jury Subpoena*, the Ninth Circuit considered a broad subpoena served on the target of an antitrust price-fixing investigation.[145] In an interview with investigators, the target stated that he had memorialized certain incriminating information in e-mails to his superiors, but that he no longer had possession of those records.[146] This prompted the government to serve him with a subpoena demanding all documents in his possession relating to the investigation "including but not limited to, handwritten notes, calendars, diaries, daybooks, . . . or any similar documents."[147] The Ninth Circuit held that the subpoena was overbroad because it exceeded the reasonably particular knowledge that the government actually possessed at the time the subpoena was served.[148] Therefore, because the government had no reason to believe that these documents existed or that the target possessed them, the act of production was privileged.[149] Relying on *Hubbell*, the Ninth Circuit reasoned that "[t]he argument that a salesman such as [the target] will always possess business records describing or memorializing meetings or prices does not establish the reasonably particular knowledge required."[150]

The *Ponds* subpoena was a great deal narrower than the subpoena in *In re Grand Jury Subpoena*, especially with regard to the request for documents "[r]eferencing use, ownership, possession, custody and/or control of

142 *See id.* at 113 (noting that, except in rare cases of a single discrete subpoenaed document, all subpoenas will require substantial cognition on the part of the respondent).

143 *See supra* note 111.

144 *In re* Grand Jury Subpoena, Dated Apr. 18, 2003, 383 F.3d 905 (9th Cir. 2004).

145 *Id.* at 907.

146 *Id.* at 908.

147 *Id.* (internal quotation marks omitted).

148 *Id.* at 911.

149 *See id.* at 912.

150 *In re Grand Jury Subpoena*, 383 F.3d at 911-12.

[the] white Mercedes Benz."[151] Unlike in *In re Grand Jury Subpoena*, the government's request in *Ponds* was narrowly tailored to the knowledge it had at the time the subpoena was served. The government knew that Ponds had received the car as payment for his legal services,[152] possessed and drove the car,[153] and that the car had eventually been registered to his sister.[154] Having proof of Ponds's use, ownership, possession, and control of the Mercedes, it would seem likely that the government could have met the "reasonable particularity" standard expressed by the Ninth Circuit.[155] However, the *Ponds* court cited the same passage from *Hubbell* used by the Ninth Circuit to condemn the request as overbroad, stating, "the government cannot show knowledge by means of broad assumptions about car ownership."[156] It makes little sense to find that the legally mandated documentation of car ownership and sale such as a registration card and title fall within the overbroad argument that "a businessman . . . will always possess general business . . . records."[157] The *Ponds* court thus appears to have overstated the subpoena's breadth to reach their preferred conclusion.

This is a problem inherent in the court's discretion in the application of the vague "reasonable particularity" and "foregone conclusion" doctrines—the same analysis and even the same language from the guiding precedent can lead to very divergent results. The D.C. and Ninth Circuits have created this problem by relying on an outdated conception of these doctrines that is no longer supported post-*Hubbell*.[158]

IV. POLICY: WHERE DO WE GO FROM HERE?

The above view of *Ponds* and *Hubbell* suggests an end to the usefulness of criminal subpoenas against the targets of government prosecu-

151 United States v. Ponds, 454 F.3d 313, 317 (D.C. Cir. 2006).

152 *Id.* at 316.

153 *Id.* at 317.

154 *Id.* at 325.

155 *See In re Grand Jury Subpoena*, 383 F.3d at 910 ("[T]he government was required . . . to establish the *existence* of the documents sought and [defendant's] *possession* of them with 'reasonable particularity' . . . ." (emphasis added)).

156 *Ponds*, 454 F.3d at 325 (citing United States v. Hubbell, 530 U.S. 27, 45 (2000) ("The Government cannot cure this deficiency [of lack of prior knowledge] through 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.")).

157 *See Hubbell*, 530 U.S. at 45. If the *Ponds* court is going to support the foregone conclusion doctrine, it seems nonsensical to say that the government did not expect to find standard ownership and transfer documents just because they were surprised by receipts for routine maintenance. *See Ponds*, 454 F.3d at 325.

158 *See Hubbell*, 530 U.S. at 44-45; *Ponds*, 454 F.3d at 320.

tions.[159] This is consistent with the Fifth Amendment's protection against self-incrimination and does not create the bleak future that some scholars suggest would await us if the government could not subpoena documents from those whom they intend to prosecute.[160]

While undoubtedly very useful to the government, subpoena power has a large potential for abuse. The ruling in *Hubbell* should appropriately limit this potential as it decreases the use of subpoenas in favor of search warrants.[161] Federal prosecutors have long preferred to avoid the "difficulties presented . . . by the particularity and probable cause requirements of the Fourth Amendment" involved in executing search warrants.[162] Prior to the *Hubbell* decision, the grand jury subpoena was preferable to a search warrant in every respect.[163] At the time *Hubbell* was decided, federal prosecutors commonly viewed their subpoena power as unlimited and not restrained in any meaningful way by the Fourth or Fifth Amendments.[164]

Under the *Fisher* doctrine, the government could grant act-of-production immunity, compel production of incriminating documents, and use the contents of those documents to build their case inside and outside the courtroom.[165] The immunity could be freely given, as it had no effect on the usefulness of the fruits of the disclosure that could be introduced in court, as if they arrived at the prosecutor's office like "manna from heaven."[166] The *Hubbell* Court found this to be an erroneous understanding of Fifth Amendment protections.[167]

This understanding of unlimited subpoena power only aggravated its inherent potential for abuse. In the federal system, prosecutors have broad

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159 *See* Allen & Mace, *supra* note 53, at 290 (noting that "[i]f *Hubbell* dominates the future, every response to a subpoena will involve sufficient cognition to implicate the privilege" and "[t]he scope of the Fifth Amendment would become so large that it would swallow subpoenas"); Cole, *supra* note 19, at 129 ("After *Hubbell*, prosecutors no longer can use a grand jury subpoena duces tecum and a grant of 'act of production immunity' to compel production of documents by an individual who is a subject or target of a grand jury investigation without risking the loss of their ability to prosecute that individual." (footnote omitted)).

160 *See, e.g.*, Uviller, *supra* note 135, at 334 ("The investigative method of choice and necessity is the subpoena duces tecum. Without it, the grand jury is helpless.").

161 *See* Cole, *supra* note 19, at 170 (noting that as a result of the broader conception of testimony under *Hubbell*, "prosecutors conducting criminal investigations may be more likely to use search warrants").

162 *Id*. at 173.

163 *Id.*; *see* Clemens, *supra* note 24, at 89 (explaining that "it is much easier for prosecutors to simply issue a subpoena, which they can do with just a signature" than to go through the "more rigorous process of securing search warrants from an independent magistrate").

164 *See* Cole, *supra* note 19, at 176.

165 United States v. Hubbell, 530 U.S. 27, 42 (2000) (rejecting prosecution's "manna from heaven" argument); *see* Cole, *supra* note 19, at 173.

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

167 *Id.*

discretion over the issuance of grand jury subpoenas.[168] They issue them without authority from the court or the grand jury.[169] Once issued, the subpoena grants the government two even greater powers—the power to levy contempt charges for non-compliance and the power to bring perjury charges if the respondent lies in court.[170] Jail time is an unduly powerful hammer in the hands of a prosecutor seeking production of documents, the existence and location of which he is uncertain. Before *Hubbell*, a respondent with incriminating documents was put in an impossible situation, even with *Fisher*'s narrow grant of act-of-production immunity; the respondent could either produce the incriminating documents that could send him to jail, or go to jail for not producing those documents. This is an unacceptable result, incongruent with common sense. Under *Hubbell*, this power was removed from the repertoire of zealous prosecutors, who must now meet the particularity and probable cause standards required for a search warrant if they want to acquire uncertain documents.[171]

Contrary to the assertions of some scholars, *Hubbell*'s expanded concept of "testimony" does not herald the end of subpoena usefulness altogether.[172] It merely ends the abusive and invasive practice of compelling incriminating private documents to be used against the target of the subpoena, making him a "witness" against himself. While it makes prosecutors' jobs more difficult, it does not place wrongdoers out of reach and free to commit crimes impervious to the criminal law as some have suggested.[173] Prosecutors can still subpoena documents from others in connection with an investigation without concern as long as those being subpoenaed are not the target of the investigation. If the target of the subpoena invokes the privilege, then prosecutors have a choice, either (1) grant act-of-production immunity consistent with *Hubbell* and rule out ever prosecuting that person or (2) consider whether a traditional investigation could lead to satisfying the requirements for a search warrant.

This conception of the scope of the testimony inherent in the act of production also diminishes the possibility that prosecutors might subvert the *Kastigar* Court's intent to make the grant of immunity a "very substan-

168 Cole, *supra* note 19, at 173 (noting that "[federal] prosecutors, not the courts, control the issuance of grand jury subpoenas, and even though the subpoenas are issued in the court's name and the authority of the court can be invoked to enforce them, the court ordinarily plays no role in their actual issuance").

169 *Id.*

170 Clemens, *supra* note 24, at 89-90.

171 *See id.* at 103-04.

172 *See* Uviller, *supra* note 135, at 334-35 (arguing *Hubbell*'s limiting effect on grand jury subpoenas threatens investigations of document-intensive crimes and that the "pragmatic implications for future exploratory investigations are dire").

173 *See id.* at 334 ("Without the records, prosecutors and their accountants might never get a handle on the transactions or figure out the situs of criminal agency. In other words: no documents, no case.").

tial protection."[174] The holding in *Kastigar* allows the government to circumvent a grant of act-of-production immunity if investigators can show that they acquired wholly separate evidence, not influenced by the target's production, as to the existence and location of the documents.[175] If they can make this showing after the target has been granted immunity and produced the requested documents, this could then make that initial act of production retroactively non-testimonial and leave the target vulnerable to having evidence identical to that which he surrendered used against him at trial.[176] If the government can prove a "wholly independent" source for the information, then the act of production is no longer testimonial, and therefore no derivative use immunity would adhere to the contents of the produced documents.[177]

Even presuming that the vast majority of federal prosecutors are honest, a more lenient conception of the testimonial nature of the act of production will incentivize some to reverse-engineer independent evidence with the knowledge gained from digesting the contents of the target's immunized, compelled documents. Prosecutors and investigators have a great deal of discretion and little public oversight in their investigations.[178] This reverse-engineering problem is much more likely to occur under the vague "reasonable particularity" and "foregone conclusion" doctrines that allow the government to vitiate the testimonial significance of the act of production with less than certain knowledge of the documents they seek. The American public and the Constitution are more consistently served by an understanding of the testimonial character of the act of production that focuses on the target's cognition and requires the government to be 100 percent certain of the existence and location of documents before the "foregone conclusion" doctrine can be triggered to sidestep the Fifth Amendment right against self-incrimination.

A more proactive investigative strategy in *Ponds* could have led to a different result that would have been consistent with *Hubbell* without the use of the "reasonable particularity" or "foregone conclusion" doctrines. Instead of passively subpoenaing Ponds and granting him immunity, the prosecution could have reached the documents through a search warrant. Had they subpoenaed Ponds's sister, whom they knew was the registered owner of the Mercedes, they could have gotten every document she had,

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174 Kastigar v. United States, 406 U.S. 441, 461 (1972).

175 *Id.* at 460. The Court makes clear that it intends a heavy burden for the government's showing of independent evidence, imposing "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* While this is comforting in a theoretical sense, this rule places a great deal of faith in prosecutors engaged in a very competitive profession and who exercise a great deal of discretion in criminal investigations.

176 *See id.* at 460-61.

177 *Id.*

178 Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 420-21.

some of which likely would have strengthened their understanding of documents which Ponds himself possessed. They could have sent an officer to Ponds's office, verifying Ponds had an employee without his testimony. They could have subpoenaed the employee's records and oral testimony and thereby gained further understanding of Ponds's situation. The "reasonable particularity" standard proposed by the *Ponds* court is not enough to compel production, but it could be enough to gain a limited search warrant, the products of which could advance the case against the target. While the major limits *Hubbell* placed on subpoena power will likely slow down investigations and require more work from prosecutors and police, it is the right policy to require the government to do a thorough and principled investigation rather than compel self-incrimination under the lie of *Fisher* act-of-production immunity.

The alternative, adopting as *Ponds* did the "reasonable particularity" and "foregone conclusion" doctrines, could lead to unacceptable results. Under these doctrines, the government can compel disclosure of private papers based on less than certain knowledge of their existence and location, and can then use their contents, along with the testimony gained by their surrender, against the respondent in court. It is difficult to see a principled distinction between this situation and one where the government compels oral testimony because they already have significant evidence against the accused giving them "reasonably particular" knowledge that the witness committed the crime, and therefore any information gained orally is a "foregone conclusion."[179]

To date, only the D.C. and Ninth Circuits have decided act-of-production cases since *Hubbell*, but both have undermined that decision by employing the newly invented "reasonable particularity" and outdated "foregone conclusion" doctrines in concert.[180] Depending on whether the other circuits follow suit, one of two outcomes is possible.

First, if the other circuits apply the same reasoning as the D.C. and Ninth Circuits, *Hubbell*'s impact will be limited to expanding the scope of the testimonial aspect of the act of production to the derivative use of the documents produced. This does not give *Hubbell*'s holding its full meaning because it retains the "foregone conclusion" doctrine that the Supreme Court decided was not applicable outside a situation in which the government has less than complete knowledge of the existence and location of the documents requested.[181] This is not ideal, but seems the safest option to protect the privilege, as even this understanding is significantly broader than *Fisher*.

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179 *See supra* note 111.

180 United States v. Ponds, 454 F.3d 313, 324-25 (D.C. Cir. 2006); *In re* Grand Jury Subpoena, Dated Apr. 18, 2003, 383 F.3d 905, 910-11 (9th Cir. 2004).

181 United States v. Hubbell, 530 U.S. 27, 44 (2000).

Second, a circuit split could develop, and the Supreme Court might then announce a clear standard to determine the testimonial value of the act of production. The future makeup of the Court is likely to change a great deal in coming years, so it is impossible to predict whether the Court will choose to affirm the broadest conception of the *Hubbell* privilege or to formally adopt the "reasonable particularity" and "foregone conclusion" hybrid doctrine employed in *Ponds.*

CONCLUSION

Ponds is an important warning for defenders of the Fifth Amendment. The *Hubbell* decision has reinvigorated the protection of private, incriminating records to a level consistent with common sense and with an originalist understanding of the text of the Fifth Amendment for the first time since *Fisher* "sounded the death-knell for *Boyd*."[182] *Ponds* illustrates that old habits die hard. Prosecutors may miss their broad subpoena power and continue to approach investigations passively. Judges can be allergic to bright-line rules that increase the demands on an already burdened system.[183] The growing public ire over the massive loss of wealth in the recent financial crisis might capitalize on these cracks in a system resistant to change by putting great pressure on prosecutors and investigators to make strong cases against suspected white-collar criminals. This environment could create incentives for the government to minimize the testimonial aspect of the act of production and to reverse-engineer proof to circumvent grants of immunity.

The old saying that "a bird in the hand is worth two in the bush" seems apropos when considering the possible future development of the act-of-production doctrine. Perhaps keeping what we can count on in the hybrid doctrine utilized by the D.C. and Ninth Circuits is better than risking another descent into the policy problems and constitutional disrespect of the *Fisher* line of cases. Then, truly, the result matters far more to the future of the Fifth Amendment than the analysis.

182 United States v. Doe, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring).

183 *See supra* Part III.