13. FOURTH AND FIFTH AMENDMENTS AND DOCUMENTS

This chapter covers one of the subtlest and hardest topics in constitutional criminal procedure, so ambitions should be kept reasonable here. Look to come away with an awareness of what the issue(s) are, a sense of why they are hard, and an idea of how to think harder and read more about them if you encounter them in practice. The good news, at least for the student, is that the law turns out to provide only very limited means to resist production of documents to government authorities and thus the issues here can be summarily dispensed with in the vast majority of situations.

Firms have no Fifth Amendment right to not talk. Companies cannot speak, of course, and their employees have only their own individual Fifth Amendment rights, not any right on behalf of their employers. The remaining issue, then, is what to do about documents, which is what firms would really like to protect (and is kind of how they "speak"). Are documents protected by the Fifth Amendment in any way? By the Fourth Amendment? By some combination of the two?

As you work through the sequence of cases in this chapter, you will see that firms have no constitutional right to resist production of evidence. But individuals have, as part of their own Fifth Amendment rights, the right to not have "the act of production" used against them—in *some* circumstances (sigh). You have to carefully track the Supreme Court's reasoning on this, and it is one of those areas where seeing how the doctrine developed over time makes it easier to understand the most recent decisions. Before proceeding into the case law, refresh your memory of the text of the Fourth and Fifth Amendments below.

U.S. Constitution Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable searches and seizures**, shall not be violated, and **no warrants shall issue, but upon probable cause**, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be **compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

A. *Boyd*: The Road Not Taken

The first case in our sequence seems to say that the Fourth and Fifth Amendments give a person the right to resist obeying what is, in essence, a regular subpoena for documents. As you will see, *Boyd* did not last, but it is an enlightening thought experiment to consider what corporate enforcement would look like now had *Boyd* remained law.

BOYD v. UNITED STATES, 116 U.S. 616 (1886)

BRADLEY, J.

This was an information filed by the district attorney of the United States in the district court for the Southern district of New York, in July, 1884, in a cause of seizure and forfeiture of property, against 35 cases of plate glass, seized by the collector as forfeited to the United States, under the twelfth section of the 'Act to amend the customs revenue laws,' etc., passed June 22, 1874, (18 St. 186.) It is declared by that section that any owner, importer, consignee, etc., who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter, or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission, by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall for each offense be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited.

The charge was that the goods in question were imported into the United States to the port of New York, subject to the payment of duties; and that the owners or agents of said merchandise, or other person unknown, committed the alleged fraud, which was described in the words of the statute. The plaintiffs in error entered a claim for the goods, and pleaded that they did not become forfeited in manner and form as alleged. On the trial of the cause it became important to show the quantity and value of the glass contained in 29 cases previously imported. To do this the district attorney offered in evidence an order made by the district judge under the fifth section of the same act of June 22, 1874, directing notice under seal of the court to be given to the claimants, requiring them to produce the invoice of the 29 cases. The claimants, in obedience to the notice, but objecting to its validity and to the constitutionality of the law, produced the invoice; and when it was offered in evidence by the district attorney they objected to its reception on the ground that, in a suit for forfeiture, no evidence can be compelled from the claimants themselves, and also that the statute, so far as it compels production of evidence to be used against the claimants, is unconstitutional and void. The evidence being received, and the trial closed, the jury found a verdict for the United States, condemning the 35 cases of glass which were seized, and judgment of forfeiture was given. This judgment was affirmed by the circuit court, and the decision of that court is now here for review. . . .

The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws-is such a proceeding for such a purpose an '*unreasonable* search and seizure' within the meaning of the fourth amendment of the constitution? or is it a legitimate proceeding? It is contended by the counsel for the government, that it is a legitimate proceeding, sanctioned by long usage, and the authority of judicial decision. No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it in the law, or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that, *consuetudo est optimus interpres legum;* and another maxim that, *contemporanea expositio est optima et fortissima in lege*. But we do not find any long usage or any contemporary construction of the constitution, which would justify any of the acts of congress now under consideration. As before stated, the act of 1863 was the first act in this country, and we might say, either in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the act under which the obnoxious writs of assistance were issued did not go as far as this, but only authorized the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid, and to enter into and search any suspected vaults, cellars, or warehouses for such goods. The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government.

The first statute passed by congress to regulate the collection of duties, the act of July 31, 1789, (1 St. 43,) contains provisions to this effect. As this act was passed by the same congress which proposed for adoption the original amendments to the constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets,

implements of gambling, etc., are not within this category. *Com.* v. *Dana*, 2 Metc. 329. Many other things of this character might be enumerated. The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the fourth or fifth amendment, or any other clause of the constitution; nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those amendments. But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession, and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery. Whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property.

In order to ascertain the nature of the proceedings intended by the fourth amendment to the constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.

'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. In the period from 1762, when the *North Briton* was started by John Wilkes, to April, 1766, when the house of commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English government and Wilkes, in which the latter appeared as the champion of popular rights, and was, indeed, the pioneer in the contest which resulted

in the abolition of some grievous abuses which had gradually crept into the administration of public affairs. Prominent and principal among these was the practice of issuing general warrants by the secretary of state, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. Certain numbers of the *North Briton*, particularly No. 45, had been very bold in denunciation of the government, and were esteemed heinously libelous. By authority of the secretary's warrant Wilkes' house was searched, and his papers were indiscriminately seized. For this outrage he sued the perpetrators and obtained a verdict of £1,000 against Wood, one of the party who made the search, and £4,000 against Lord Halifax, the secretary of state, who issued the warrant. The case, however, which will always be celebrated as being the occasion of Lord CAMDEN'S memorable discussion of the subject, was that of *Entick* v. *Carrington and Three Other King's Messengers*, reported at length in 19 How. St. Tr. 1029. The action was trespass for entering the plaintiff's dwelling-house in November, 1762, and breaking open his desks, boxes, etc., and searching and examining his papers. The jury rendered a special verdict, and the case was twice solemnly argued at the bar. Lord CAMDEN pronounced the judgment of the court in Michaelmas term, 1765, and the law, as expounded by him, has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British constitution, and is quoted as such by the English authorities on that subject down to the present time.

As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the fourth amendment to the constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. . . .

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense[. I]t is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other. . . .

We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment;

and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment. And 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. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. In this very case the ground of forfeiture, as declared in the twelfth section of the act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute; and it is declared, that the offender shall be fined not exceeding $5,000, nor less than $50, or be imprisoned not exceeding two years, or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts, the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. . . .

We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings. We are of opinion, therefore, that the judgment of the circuit court should be reversed, and the cause remanded, with directions to award a new trial; and it is so ordered. . . .

The next case begins to chip away at *Boyd* and clarifies a great deal the question of what Fifth and Fourth Amendment rights corporations possess, if any. Notice the gap between *Boyd* (1886) and *Hale* (1906) and think about general developments in U.S. history during that time that may explain the shift in jurisprudence.

HALE v. HENKEL, 201 U.S. 43 (1906)

Mr. Justice Brown delivered the opinion of the court.

[The basic facts of this case are as follows: A corporation was served a subpoena for records to prove a Sherman Act violation. Hale, an employee of the corporation and the Appellant in this action, refused to produce the documents and was held in contempt.]

. . . Appellant also invokes the protection of the 5th Amendment to the Constitution, which declares that no person 'shall be compelled in any criminal case to be a witness against himself,' and in reply to various questions put to him he declined to answer, on the ground that he would thereby incriminate himself. . . .

But it is further insisted that, while the immunity statute may protect individual witnesses, it would not protect the corporation of which appellant was the agent and representative. This is true, but the answer is that it was not designed to do so. The right of a person under the 5th Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a 'person' within the meaning of this amendment really does not arise, except, perhaps, where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employees. The amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself;* and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman antitrust act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employees, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject? Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection. We hold that the questions should have been answered.

The second branch of the case relates to the nonproduction by the witness of the books and papers called for by the *subpoena duces tecum*. The witness put his refusal on the ground, first, that it was impossible for him to collect them within the time allowed; second, because he was advised by counsel that, under the circumstances, he was under no obligation to produce them; and finally, because they might tend to incriminate him.

Had the witness relied solely upon the first ground, doubtless the court would have given him the necessary time. The last ground we have already held untenable. While the second ground does not set forth with technical accuracy the real reason for declining to produce them, the witness could not be expected to speak with legal exactness, and we think is entitled to assert that the subpoena was an infringement upon the 4th Amendment to the Constitution, which declares that 'the right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' . . .

Having already held that, by reason of the immunity act of 1903, the witness could not avail himself of the 5th Amendment it follows that he cannot set up that amendment as against the production of the books and papers, since, in respect to these, he would also be protected by the immunity act. We think it quite clear that the search and seizure clause of the 4th Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum*, the production, upon a trial in court, of documentary evidence. As remarked in *Summers v. Moseley*, 2 Cromp. & M. 477, it would be 'utterly impossible to carry on the administration of justice' without this writ. . . .

If, whenever an officer or employee of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless

protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the legislature of that state; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over the state corporations.

Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with a violation of a statute of the state of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the 4th Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the 14th Amendment, against unlawful discrimination. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.

We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd Case*, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum*, against which the person, be he individual or corporation, is entitled to protection.

B. The Modern Fifth Amendment and the "Testimonial Act of Production"

The next case, *Fisher*, is a bit more complicated because the attorney-client privilege is also involved, but here the modern Supreme Court works out what the Fifth Amendment privilege really is as it concerns pre-existing documents: It is individual and it involves the act of production. While the case is a short run defeat for those resisting subpoenas,

it ultimately leaves them with some potential basis to object to production.

FISHER v. UNITED STATES, 425 U.S. 391 (1976)

MR. JUSTICE WHITE delivered the opinion of the Court.

In these two cases we are called upon to decide whether a summons directing an attorney to produce documents delivered to him by his client in connection with the attorney-client relationship is enforceable over claims that the documents were constitutionally immune from summons in the hands of the client and retained that immunity in the hands of the attorney.

In each case, an Internal Revenue agent visited the taxpayer or taxpayers and interviewed them in connection with an investigation of possible civil or criminal liability under the federal income tax laws. Shortly after the interviews—one day later in No. 74-611 and a week or two later in No. 74-18—the taxpayers obtained from their respective accountants certain documents relating to the preparation by the accountants of their tax returns. Shortly after obtaining the documents—later the same day in No. 74-611 and a few weeks later in No. 74-18—the taxpayers transferred the documents to their lawyers—respondent Kasmir and petitioner Fisher, respectively—each of whom was retained to assist the taxpayer in connection with the investigation. Upon learning of the whereabouts of the documents, the Internal Revenue Service served summonses on the attorneys directing them to produce documents listed therein. . . .

All of the parties in these cases and the Court of Appeals for the Fifth Circuit have concurred in the proposition that if the Fifth Amendment would have excused a taxpayer from turning over the accountant's papers had he possessed them, the attorney to whom they are delivered for the purpose of obtaining legal advice should also be immune from subpoena. Although we agree with this proposition for the reasons set forth in Part III, infra, we are convinced that, under our decision in *Couch v. United States*, 409 U.S. 322 (1973), it is not the taxpayer's Fifth Amendment privilege that would excuse the attorney from production. The relevant part of that Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself."

The taxpayer's privilege under this Amendment is not violated by enforcement of the summonses involved in these cases because enforcement against a taxpayer's lawyer would not "compel" the taxpayer to do anything—and certainly would not compel him to be a "witness" against himself. The Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of "physical or moral compulsion" exerted on the person asserting the privilege. In *Couch v. United States*, supra, we recently ruled that the Fifth Amendment rights of a taxpayer were not violated by the enforcement of a documentary summons directed to her accountant and requiring production of the taxpayer's own records in the possession of the accountant. We did so on the ground that in such a case "the ingredient of personal compulsion against an accused is lacking." 409 U.S., at 329.

Here, the taxpayers are compelled to do no more than was the taxpayer in Couch. The taxpayers' Fifth Amendment privilege is therefore not violated by enforcement of the summonses directed toward their attorneys. This is true whether or not the Amendment would have barred a subpoena directing the taxpayer to produce the documents while they were in his hands. . . .

Respondents in No. 74-611 and petitioners in No. 74-18 argue, and the Court of Appeals for the Fifth Circuit apparently agreed, that if the summons was enforced, the taxpayer's Fifth Amendment privilege would be, but should not be, lost solely because they gave their documents to their lawyers in order to obtain legal advice. But this misconceives the nature of the constitutional privilege. The Amendment protects a person from being compelled to be a witness against himself. Here, the taxpayers retained any privilege they ever had not to be compelled to testify against themselves and not to be compelled themselves to produce private papers in their possession. This personal privilege was in no way decreased by the transfer. It is simply that by reason of the transfer of the documents to the attorneys, those papers may be subpoenaed without compulsion on the taxpayer. The protection of the Fifth Amendment is therefore not available. "A party is privileged from producing evidence but not from its production." *Johnson v. United States, supra,* at 458. The Court of Appeals for the Fifth Circuit suggested that because legally and ethically the attorney was required to respect the confidences of his client, the latter had a reasonable expectation of privacy for the records in the hands of the attorney and therefore did not forfeit his Fifth Amendment privilege with respect to the records by transferring them in order to obtain legal advice. It is true that the Court has often stated that one of the several purposes served by the constitutional privilege against compelled testimonial self-incrimination is that of protecting personal privacy. But the Court has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.

The proposition that the Fifth Amendment protects private information obtained without compelling self-incriminating testimony is contrary to the clear statements of this Court that under appropriate safeguards private incriminating statements of an accused may be overheard and used in evidence, if they are not compelled at the time they were uttered, and that disclosure of private information may be compelled if immunity removes the risk of incrimination. If the Fifth Amendment protected generally against the obtaining of private information from a man's mouth or pen or house, its protections would presumably not be lifted by probable cause and a warrant or by immunity. The privacy invasion is not mitigated by immunity; and the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness. The Framers addressed the subject of personal privacy directly in the Fourth Amendment. They struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and

seize will issue. They did not seek in still another Amendment—the Fifth—to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination. 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." *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975). Insofar as private information not obtained through compelled self-incriminating testimony is legally protected, its protection stems from other sources—the Fourth Amendment's protection against seizures without warrant or probable cause and against subpoenas which suffer from "too much indefiniteness or breadth in the things required to be 'particularly described,'" *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946), the First Amendment, or evidentiary privileges such as the attorney-client privilege.

Our above holding is that compelled production of documents from an attorney does not implicate whatever Fifth Amendment privilege the taxpayer might have enjoyed from being compelled to produce them himself. The taxpayers in these cases, however, have from the outset consistently urged that they should not be forced to expose otherwise protected documents to summons simply because they have sought legal advice and turned the papers over to their attorneys. The Government appears to agree unqualifiedly. The difficulty is that the taxpayers have erroneously relied on the Fifth Amendment without urging the attorney-client privilege in so many words. They have nevertheless invoked the relevant body of law and policies that govern the attorney-client privilege. In this posture of the case, we feel obliged to inquire whether the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment.

Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege. This Court and the lower courts have thus uniformly held that pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by client in order to obtain more informed legal advice. The purpose of the privilege requires no broader rule. Pre-existing documents obtainable from the client are not appreciably easier to obtain from the attorney after transfer to him. Thus, even absent the attorney-client privilege, clients will not be discouraged from disclosing the documents to the attorney, and their ability to obtain informed legal advice will

remain unfettered. It is otherwise if the documents are not obtainable by subpoena duces tecum or summons while in the exclusive possession of the client, for the client will then be reluctant to transfer possession to the lawyer unless the documents are also privileged in the latter's hands. Where the transfer is made for the purpose of obtaining legal advice, the purposes of the attorney-client privilege would be defeated unless the privilege is applicable. "It follows, then, that when the client himself would be privileged from production of the document, either as a party at common law… or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce." 8 Wigmore § 2307, p. 592. Lower courts have so held. This proposition was accepted by the Court of Appeals for the Fifth Circuit below, is asserted by petitioners in No. 74-18 and respondents in No. 74-611, and was conceded by the Government in its brief and at oral argument. Where the transfer to the attorney is for the purpose of obtaining legal advice, we agree with it.

Since each taxpayer transferred possession of the documents in question from himself to his attorney, in order to obtain legal assistance in the tax investigations in question, the papers, if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the attorney-client privilege. We accordingly proceed to the question whether the documents could have been obtained by summons addressed to the taxpayer while the documents were in his possession. The only bar to enforcement of such summons asserted by the parties or the courts below is the Fifth Amendment's privilege against self-incrimination.

The proposition that the Fifth Amendment prevents compelled production of documents over objection that such production might incriminate stems from *Boyd v. United States*, 116 U.S. 616 (1886). . . .

Among its several pronouncements, *Boyd* was understood to declare that the seizure, under warrant or otherwise, of any purely evidentiary materials violated the Fourth Amendment and that the Fifth Amendment rendered these seized materials inadmissible. That rule applied to documents as well as to other evidentiary items—"[t]here is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized. . . ." *Gouled v. United States*, *supra*, at 309. Private papers taken from the taxpayer, like other "mere evidence," could not be used against the accused over his Fourth and Fifth Amendment objections. Several of Boyd's express or implicit declarations have not stood the test of time. The application of the Fourth Amendment to subpoenas was limited by *Hale v. Henkel*, 201 U.S. 43 (1906), and more recent cases. Purely evidentiary (but "nontestimonial") materials, as well as contraband and fruits and instrumentalities of crime, may now be searched for and seized under proper circumstances. Also, any notion that "testimonial" evidence may never be seized and used in evidence is inconsistent with *Katz v. United States*, 389 U.S. 347 (1967), approving the seizure under appropriate circumstances of conversations of a person suspected of crime.

It is also clear 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. We have, accordingly, declined to extend the protection of the privilege to the giving of blood samples, *Schmerber v. California*, 384 U.S. 757, 763–64 (1966); to the giving of handwriting exemplars, *Gilbert v. California*, 388 U.S. 263, 265–67 (1967); voice exemplars, *United States v. Wade*, 388 U.S. 218, 222–23, (1967); or the donning of a blouse worn by the perpetrator, *Holt v. United States*, 218 U.S. 245 (1910). Furthermore, despite *Boyd*, neither a partnership nor the individual partners are shielded from compelled production of partnership records on self-incrimination grounds. *Bellis v. United States*, 417 U.S. 85 (1974). It would appear that under that case the precise claim sustained in *Boyd* would now be rejected for reasons not there considered.

The pronouncement in *Boyd* that a person may not be forced to produce his private papers has nonetheless often appeared as dictum in later opinions of this Court. To the extent, however, that the rule against compelling production of private papers rested on the proposition that seizures of or subpoenas for "mere evidence," including documents, violated the Fourth Amendment and therefore also transgressed the Fifth, the foundations for the rule have been washed away. In consequence, 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 against compelling a person to give "testimony" that incriminates him. Accordingly, we turn to the question of what, if any, incriminating testimony within the Fifth Amendment's protection, is compelled by a documentary summons. A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it 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. The accountant's workpapers are not the taxpayer's. They were not prepared by the taxpayer, and they contain no testimonial declarations by him. Furthermore, as far as this record demonstrates, the 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. 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.

The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both "testimonial" and "incriminating" for purposes of

applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof. In light of the records now before us, we are confident that however incriminating the contents of the accountant's workpapers might be, the act of producing them—the only thing which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination.

It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. The papers belong to the accountant, were prepared by him, and 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 "truthtelling" of the taxpayer to prove the existence of or his access to the documents. The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons "no constitutional rights are touched. The question is not of testimony but of surrender." *In re Harris*, 221 U.S. 274, 279 (1911). 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. In any event, although the exemplar may be incriminating to the accused and although he is compelled to furnish it, his Fifth Amendment privilege is not violated because nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege. This Court has also time and again allowed subpoenas against the custodian of corporate documents or those belonging to other collective entities such as unions and partnerships and those of bankrupt businesses over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor. The existence and possession or control of the subpoenaed documents being no more in issue here than in the above cases, the summons is equally enforceable.

Moreover, assuming that these aspects of producing the accountant's papers have some minimal testimonial significance, surely it is not illegal to seek accounting help in connection with one's tax returns or for the accountant to prepare workpapers and deliver them to the taxpayer. At this juncture, we are quite unprepared to hold that either the fact of existence of the papers or of their possession by the taxpayer poses any realistic threat of incrimination to the taxpayer.

As for the possibility that responding to the subpoena would authenticate the workpapers, production would express nothing more than the taxpayer's belief that the papers are those described in the subpoena. The taxpayer would be no more competent to authenticate the accountant's workpapers or reports by producing them than he would be to authenticate them if testifying orally. The taxpayer did not prepare the papers and could not vouch for their accuracy. The documents would not be admissible in evidence against the taxpayer without authenticating testimony. Without more, responding to the subpoena in the circumstances before us would not appear to represent a substantial

threat of self-incrimination. Moreover, in *Wilson v. United States*, supra, the custodian of corporate, union or partnership books or those of a bankrupt business was ordered to respond to a subpoena for the business' books even though doing so involved a "representation that the documents produced are those demanded by the subpoena," *Curcio v. United States*, 354 U.S., at 125.

Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his "private papers," *see Boyd v. United States*, 116 U.S., at 634–35. We do hold that compliance with a summons directing the taxpayer to produce the accountant's documents involved in these cases would involve no incriminating testimony within the protection of the Fifth Amendment. . . .

Because *Fisher* is unusually tricky, let us recap:

(1) The client gives his accounting and tax records to his lawyer;

(2) The government subpoenas the documents from the lawyer;

(3) The lawyer raises the attorney-client privilege as a shield to production of the records;

(4) Under the instrumental policy rationale supporting the attorney-client privilege, the privilege applies to the documents only if *not* shielding such documents with the privilege would cause a client to hesitate to share such records with his lawyer;

(5) The client would not hesitate to share such documents with his lawyer if, in any event, the client could not protect them by keeping them in his own possession;

(6) Therefore, to decide whether the privilege applies to the documents, it is necessary to decide whether the client could resist production of the documents if instead he retained possession of them;

(7) The client could not object to production of the documents on the grounds that their contents are protected by the Fifth Amendment because there is no Fifth Amendment right with respect to the contents of documents the government does not compel one to create;

(8) However, the client does have a Fifth Amendment right with respect to the act of producing the documents, if that act itself could incriminate the client by authenticating the documents or conceding their existence for government investigators;

(9) The existence of these tax records was sufficiently known to the government, and the accountant could have been used to authenticate them, so nothing about the client’s act of production would have incriminated the client;

(10) Because the client could not have resisted production of the documents had he retained them, the attorney-client privilege need not apply to the documents when

possessed by the lawyer: the availability of the privilege would not influence, one way or the other, a client's decision whether to retain such documents or share them with a lawyer.

To summarize the key takeaways from *Fisher*: An individual cannot raise a Fifth Amendment objection to someone else's testimony or production. Furthermore, the Fifth Amendment does not protect against the compelled production of incriminating evidence, only against incriminating testimonial communication. Whether the "act of production" itself constitutes a testimonial communication depends on the facts and circumstances. If the government is relying on the "truth-telling" of the individual to prove the existence of or access to documents, then the act of production may be testimonial.

The following case further clarifies the meaning of *Fisher*.

UNITED STATES v. DOE, 465 U.S. 605 (1984)

Justice POWELL delivered the opinion of the Court.

This case presents the issue whether, and to what extent, the Fifth Amendment privilege against compelled self-incrimination applies to the business records of a sole proprietorship.

Respondent is the owner of several sole proprietorships. In late 1980, a grand jury, during the course of an investigation of corruption in the awarding of county and municipal contracts, served five subpoenas on respondent. The first two demanded the production of the telephone records of several of respondent's companies and all records pertaining to four bank accounts of respondent and his companies. The subpoenas were limited to the period between January 1, 1977 and the dates of the subpoenas. The third subpoena demanded the production of a list of virtually all the business records of one of respondent's companies for the period between January 1, 1976, and the date of the subpoena. The fourth subpoena sought production of a similar list of business records belonging to another company. The final subpoena demanded production of all bank statements and cancelled checks of two of respondent's companies that had accounts at a bank in the Grand Cayman Islands.

Respondent filed a motion in federal district court seeking to quash the subpoenas. The District Court for the District of New Jersey granted his motion except with respect to those documents and records required by law to be kept or disclosed to a public agency. In reaching its decision, the District Court noted that the Government had conceded that the materials sought in the subpoena were or might be incriminating. The court stated that, therefore, "the relevant inquiry is . . . whether the act of producing the documents has communicative aspects which warrant Fifth Amendment protection." 541 F. Supp. 1, 3 (1981) (emphasis in original). The court found that the act of production would compel respondent to "admit that the records exist, that they are in his possession, and that they are authentic." *Ibid.* While not ruling out the possibility that the Government

could devise a way to ensure that the act of turning over the documents would not incriminate respondent, the court held that the Government had not made such a showing. . . .

The Court in Fisher expressly declined to reach the question whether the Fifth Amendment privilege protects the contents of an individual's tax records in his possession. The rationale underlying our holding in that case is, however, persuasive here. As we noted in Fisher, the Fifth Amendment protects the person asserting the privilege only from compelled self-incrimination. Where the preparation of business records is voluntary, no compulsion is present. A subpoena that demands production of documents "does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought." *Id.,* at 409, 96 S. Ct., at 1580. . . .

[*Fisher*'s] reasoning applies with equal force here. Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged.

Although the contents of a document may not be privileged, the act of producing the document may be. A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect. . . .

In *Fisher,* the Court explored the effect that the act of production would have on the taxpayer and determined that the act of production would have only minimal testimonial value and would not operate to incriminate the taxpayer. Unlike the Court in *Fisher,* we have the explicit finding of the District Court that the act of producing the documents would involve testimonial self-incrimination. The Court of Appeals agreed. The District Court's finding essentially rests on its determination of factual issues. Therefore, we will not overturn that finding unless it has no support in the record. *Ibid.* Traditionally, we also have been reluctant to disturb findings of fact in which two courts below have concurred. We therefore decline to overturn the finding of the District Court in this regard, where, as here, it has been affirmed by the Court of Appeals. . . .

We conclude that the Court of Appeals erred in holding that the contents of the subpoenaed documents were privileged under the Fifth Amendment. The act of producing the documents at issue in this case is privileged and cannot be compelled without a statutory grant of use immunity pursuant to 18 U.S.C. §§ 6002 and 6003. The judgment of the Court of Appeals is, therefore, affirmed in part, reversed in part, and the case is remanded to the District Court for further proceedings in accordance with this decision.

Justice O'CONNOR, concurring.

I concur in both the result and reasoning of Justice Powell's opinion for the Court. I write

separately, however, just to make explicit what is implicit in the analysis of that opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind. The notion that the Fifth Amendment protects the privacy of papers originated in *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed. 746 (1886), but our decision in *Fisher v. United States*, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976), sounded the death-knell for *Boyd*. "Several of *Boyd*'s express or implicit declarations [had] not stood the test of time[,]" *id.*, at 407, 96 S. Ct., at 1579, and its privacy of papers concept "had long been a rule searching for a rationale . . . ." *Id.*, at 409, 96 S. Ct., at 1580. Today's decision puts a long-overdue end to that fruitless search. . . .

Note that a few years later, in *Braswell v. United States*, 487 U.S. 99 (1988), the Supreme Court held that although individuals have the rights described in *Fisher* and *Doe*, they can still be made to produce and authenticate documents in their capacity as *records custodians* for firms. However, what they do in that custodial capacity cannot be used against them in any individual prosecution.

The following case is the most recent Supreme Court word on all of this. It is not an easy case, but it is the clearest statement we have on when the use of a person's "act of production" against them violates the person's Fifth Amendment rights.

Immunity and *Kastigar* were covered in the last chapter, so it should make sense to you now how the Fifth Amendment analysis works structurally, even if this case leaves open some issues about exactly when the "act of production" privilege will apply. As you read, carefully follow the procedural steps taken with regards to this man, Hubbell.

UNITED STATES v. HUBBELL, 530 U.S. 27 (2000)

JUSTICE STEVENS delivered the opinion of the Court.

The two questions presented concern the scope of a witness' protection against compelled self-incrimination: (1) whether the Fifth Amendment privilege protects a witness from being compelled to disclose the existence of incriminating documents that the Government is unable to describe with reasonable particularity; and (2) if the witness produces such documents pursuant to a grant of immunity, whether 18 U.S.C. § 6002 prevents the Government from using them to prepare criminal charges against him.

This proceeding arises out of the second prosecution of respondent, Webster Hubbell, commenced by the Independent Counsel appointed in August 1994 to investigate possible violations of federal law relating to the Whitewater Development Corporation. The first prosecution was terminated pursuant to a plea bargain. In December 1994, respondent pleaded guilty to charges of mail fraud and tax evasion arising out of his billing practices as a member of an Arkansas law firm from 1989 to 1992, and was sentenced to 21 months in prison. In the plea agreement, respondent promised to provide the Independent Counsel with "full, complete, accurate, and truthful information" about

matters relating to the Whitewater investigation.

The second prosecution resulted from the Independent Counsel's attempt to determine whether respondent had violated that promise. In October 1996, while respondent was incarcerated, the Independent Counsel served him with a subpoena *duces tecum* calling for the production of 11 categories of documents before a grand jury sitting in Little Rock, Arkansas. On November 19, he appeared before the grand jury and invoked his Fifth Amendment privilege against self-incrimination. In response to questioning by the prosecutor, respondent initially refused "to state whether there are documents within my possession, custody, or control responsive to the Subpoena." Thereafter, the prosecutor produced an order, which had previously been obtained from the District Court pursuant to 18 U.S.C. § 6003(a), directing him to respond to the subpoena and granting him immunity "to the extent allowed by law." Respondent then produced 13,120 pages of documents and records and responded to a series of questions that established that those were all of the documents in his custody or control that were responsive to the commands in the subpoena, with the exception of a few documents he claimed were shielded by the attorney-client and attorney work-product privileges.

The contents of the documents produced by respondent provided the Independent Counsel with the information that led to this second prosecution. On April 30, 1998, a grand jury in the District of Columbia returned a 10-count indictment charging respondent with various tax-related crimes and mail and wire fraud. The District Court dismissed the indictment relying, in part, on the ground that the Independent Counsel's use of the subpoenaed documents violated § 6002 because all of the evidence he would offer against respondent at trial derived either directly or indirectly from the testimonial aspects of respondent's immunized act of producing those documents. Noting that the Independent Counsel had admitted that he was not investigating tax-related issues when he issued the subpoena, and that he had "'learned about the unreported income and other crimes from studying the records' contents,'" the District Court characterized the subpoena as "the quintessential fishing expedition." 11 F. Supp. 2d at 37.

The Court of Appeals vacated the judgment and remanded for further proceedings. The majority concluded that the District Court had incorrectly relied on the fact that the Independent Counsel did not have prior knowledge of the contents of the subpoenaed documents. The question the District Court should have addressed was the extent of the Government's independent knowledge of the documents' existence and authenticity, and of respondent's possession or control of them. . . .

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

would only shield the witness from the use of any information resulting from his subpoena response "beyond what the prosecutor would receive if the documents appeared in the grand jury room or in his office unsolicited and unmarked, like manna from heaven." 166 F.3d at 602.

On remand, the Independent Counsel acknowledged that he could not satisfy the "reasonable particularity" standard prescribed by the Court of Appeals and entered into a conditional plea agreement with respondent. In essence, the agreement provides for the dismissal of the charges unless this Court's disposition of the case makes it reasonably likely that respondent's "act of production immunity" would not pose a significant bar to his prosecution. The case is not moot, however, because the agreement also provides for the entry of a guilty plea and a sentence that will not include incarceration if we should reverse and issue an opinion that is sufficiently favorable to the Government to satisfy that condition. Despite that agreement, we 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. We now affirm.

It is useful to preface our analysis of the constitutional issue with a restatement of certain propositions that are not in dispute. The term "privilege against self-incrimination" is not an entirely accurate description of a person's constitutional protection against being "compelled in any criminal case to be a witness against himself."

The word "witness" in the constitutional text limits the relevant category of compelled incriminating communications to those that are "testimonial" in character. As Justice Holmes observed, there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating. Thus, even though the act may provide incriminating evidence, a criminal suspect may be compelled to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice. The act of exhibiting such physical characteristics is not the same as a sworn communication by a witness that relates either express or implied assertions of fact or belief. Similarly, the fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege.

More relevant to this case is the settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not "compelled" within the meaning of the privilege. . . .

On the other hand, we have also made it clear that the act of producing documents in response to a subpoena may have a compelled testimonial aspect. We have held that "the act of production" itself may implicitly communicate "statements of fact." By "producing documents in compliance with a subpoena, the witness would admit that the

papers existed, were in his possession or control, and were authentic." Moreover, as was true in this case, when the custodian of documents responds to a subpoena, he may be compelled to take the witness stand and answer questions designed to determine whether he has produced everything demanded by the subpoena. The answers to those questions, as well as the act of production itself, may certainly communicate information about the existence, custody, and authenticity of the documents. Whether the constitutional privilege protects the answers to such questions, or protects the act of production itself, is a question that is distinct from the question whether the unprotected contents of the documents themselves are incriminating.

Finally, the phrase "in any criminal case" in the text of the Fifth Amendment might have been read to limit its coverage to compelled testimony that is used against the defendant in the trial itself. It has, however, long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence. Thus, a half-century ago we held that a trial judge had erroneously rejected a defendant's claim of privilege on the ground that his answer to the pending question would not itself constitute evidence of the charged offense. As we explained: "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman* v. *United States*, 341 U.S. 479, 486, 95 L. Ed. 1118 (1951). Compelled testimony that communicates information that may "lead to incriminating evidence" is privileged even if the information itself is not inculpatory. It is the Fifth Amendment's protection against the prosecutor's use of incriminating information derived directly or indirectly from the compelled testimony of the respondent that is of primary relevance in this case. . . .

The Government correctly emphasizes that the testimonial aspect of a response to a subpoena *duces tecum* does nothing more than establish the existence, authenticity, and custody of items that are produced. We assume that the Government is also entirely correct in its submission that it would not have to advert to respondent's act of production in order to prove the existence, authenticity, or custody of any documents that it might offer in evidence at a criminal trial; indeed, the Government disclaims any need to introduce any of the documents produced by respondent into evidence in order to prove the charges against him. It follows, according to the Government, that it has no intention of making improper "use" of respondent's compelled testimony.

The question, however, is not whether the response to the subpoena may be introduced into evidence at his criminal trial. That would surely be a prohibited "use" of the immunized act of production. But the fact that the Government intends no such use of the act of production leaves open the separate question whether it has already made "derivative use" of the testimonial aspect of that act in obtaining the indictment against respondent and in preparing its case for trial. It clearly has.

It is apparent from the text of the subpoena itself that the prosecutor needed respondent's

assistance both to identify potential sources of information and to produce those sources. Given the breadth of the description of the 11 categories of documents called for by the subpoena, the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions. The assembly of literally hundreds of pages of material in response to a request for "any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to" an individual or members of his family during a 3-year period is the functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery deposition. Entirely apart from the contents of the 13,120 pages of materials that respondent produced in this case, it is undeniable that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a "lead to incriminating evidence," or "a link in the chain of evidence needed to prosecute."

Indeed, the record makes it clear that that is what happened in this case. The documents were produced before a grand jury sitting in the Eastern District of Arkansas in aid of the Independent Counsel's attempt to determine whether respondent had violated a commitment in his first plea agreement. The use of those sources of information eventually led to the return of an indictment by a grand jury sitting in the District of Columbia for offenses that apparently are unrelated to that plea agreement. What the District Court characterized as a "fishing expedition" did produce a fish, but not the one that the Independent Counsel expected to hook. It is abundantly clear that the testimonial aspect of respondent's act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution. The documents did not magically appear in the prosecutor's office like "manna from heaven." They arrived there only after respondent asserted his constitutional privilege, received a grant of immunity, and—under the compulsion of the District Court's order—took the mental and physical steps necessary to provide the prosecutor with an accurate inventory of the many sources of potentially incriminating evidence sought by the subpoena. It was only through respondent's truthful reply to the subpoena that the Government received the incriminating documents of which it made "substantial use . . . in the investigation that led to the indictment." Brief for United States 3.

For these reasons, we cannot accept the Government's submission that respondent's immunity did not preclude its derivative use of the produced documents because its "possession of the documents [was] the fruit *only* of a simple physical act—the act of producing the documents." It 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. 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. The Government's anemic view of respondent's act of production as a mere physical act that is principally non-testimonial in character and can be entirely divorced from its "implicit" testimonial aspect so as to constitute a "legitimate, wholly

independent source" (as required by *Kastigar*) for the documents produced simply fails to account for these realities.

In sum, we have no doubt that the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence. That constitutional privilege has the same application to the testimonial aspect of a response to a subpoena seeking discovery of those sources. Before the District Court, the Government arguably conceded that respondent's act of production in this case had a testimonial aspect that entitled him to respond to the subpoena by asserting his privilege against self-incrimination. On appeal and again before this Court, however, the Government has argued that the communicative aspect of respondent's act of producing ordinary business records is insufficiently "testimonial" to support a claim of privilege because the existence and possession of such records by any businessman is a "foregone conclusion" under our decision in *Fisher* v. *United States*, 425 U.S. at 411. This argument both misreads *Fisher* and ignores our subsequent decision in *United States* v. *Doe*, 465 U.S. 605 (1984). . . .

Whatever the scope of this "foregone conclusion" rationale, the facts of this case plainly fall outside of it. While in *Fisher* the Government already knew that the documents were in the attorneys' possession and could independently confirm their existence and authenticity through the accountants who created them, here the Government has not shown that it had any prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by respondent. The Government cannot cure this deficiency 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. The *Doe* subpoenas also sought several broad categories of general business records, yet we upheld the District Court's finding that the act of producing those records would involve testimonial self-incrimination.

Given our conclusion that respondent's act of production had a testimonial aspect, at least with respect to the existence and location of the documents sought by the Government's subpoena, respondent could not be compelled to produce those documents without first receiving a grant of immunity under § 6003. As we construed § 6002 in *Kastigar*, such immunity is co-extensive with the constitutional privilege. *Kastigar* requires that respondent's motion to dismiss the indictment on immunity grounds be granted unless the Government proves that the evidence it used in obtaining the indictment and proposed to use at trial was derived from legitimate sources "wholly independent" of the testimonial aspect of respondent's immunized conduct in assembling and producing the documents described in the subpoena. The Government, however, does not claim that it could make such a showing. Rather, it contends that its prosecution of respondent must be considered proper unless someone—presumably respondent—shows that "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." We could not accept this submission without repudiating the basis for our conclusion in *Kastigar* that the statutory guarantee of use and derivative-use immunity is as broad as the constitutional privilege itself. This we are not prepared to do.

The Eleventh Circuit has analyzed how *Fisher* and *Hubbell* apply to a government effort to obtain a computer hard drive and its decryption from an individual by court order. *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335 (11th Cir. 2012). The court, referring to the individual as "Doe," found the Fifth Amendment to apply under the following analysis:

> We hold that the act of Doe's decryption and production of the contents of the hard drives would sufficiently implicate the Fifth Amendment privilege. We reach this holding by concluding that (1) Doe's decryption and production of the contents of the drives would be testimonial, not merely a physical act; and (2) the explicit and implicit factual communications associated with the decryption and production are not foregone conclusions.
>
> First, the decryption and production of the hard drives would require the use of the contents of Doe's mind and could not be fairly characterized as a physical act that would be nontestimonial in nature. We conclude that the decryption and production would be tantamount to testimony by Doe of his knowledge of the existence and location of potentially incriminating files; of his possession, control, and access to the encrypted portions of the drives; and of his capability to decrypt the files.
>
> We are unpersuaded by the Government's derivation of the key/combination analogy in arguing that Doe's production of the unencrypted files would be nothing more than a physical nontestimonial transfer. The Government attempts to avoid the analogy by arguing that it does not seek the combination or the key, but rather the contents. This argument badly misses the mark. In *Fisher*, where the analogy was born, and again in *Hubbell*, the Government never sought the "key" or the "combination" to the safe for its own sake; rather, the Government sought the files being withheld, just as the Government does here. Requiring Doe to use a decryption password is most certainly more akin to requiring the production of a combination because both demand the use of the contents of the mind, and the production is accompanied by the implied factual statements noted above that could prove to be incriminatory. Hence, we conclude that what the Government seeks to compel in this case, the decryption and production of the contents of the hard drives, is testimonial in character.

> Moving to the second point, the question becomes whether the purported testimony is a "foregone conclusion." We think not. Nothing in the record before us reveals that the Government knows whether any files exist and are located on the hard drives; what's more, nothing in the record illustrates that the Government knows with reasonable particularity that Doe is even capable of accessing the encrypted portions of the drives.

Finally, on the following pages, Professor Beale gives us some help in stepping back and putting this complicated story together.

THE FIFTH AMENDMENT AND THE GRAND JURY

Sara Sun Beale & James E. Felman, 22 CRIM. JUSTICE 4 (2007)

One of the most complex and difficult areas of current grand jury law is the intersection of the grand jury's subpoena power and the Fifth Amendment rights of those subpoenaed. Grand juries issue subpoenas for only one reason--to obtain evidence of a crime. It follows that those subpoenaed will be called upon at times to produce documents or give testimony that might tend to incriminate them. Because this tension is inherent in the nature of the grand jury process, one might assume that the applicable law would be fairly well settled. As we explain below, however, in a number of important areas there is considerable uncertainty and ongoing evolution. Although we refer below principally to federal cases, the constitutional principles we discuss are equally applicable to state grand jury proceedings.

Our discussion is divided into two parts—(1) subpoenas issued to individuals for their own personal documents or testimony, and (2) subpoenas issued to individuals as custodians of the records of entities. Within each part we have further subdivided our discussion between subpoenas seeking documents and subpoenas seeking testimony.

Subpoenas to individuals. Subpoenas to individuals may seek documents, testimony, or both. We begin with a discussion of testimonial subpoenas, and then turn to the additional and more difficult issues presented by document subpoenas. . . .

Individual subpoenas for documents. The Fifth Amendment was originally interpreted to protect all private papers from compelled production, *Boyd v. United States*, 116 U.S. 616 (1886), but the Supreme Court has abandoned that interpretation. Under the current understanding of the Fifth Amendment, the courts draw a distinction between the content of subpoenaed documents and the actions required to produce such documents, giving greater protection to the act of production and raising many thorny issues.

It is now settled that an individual may not withhold documents from production pursuant to a grand jury subpoena on the ground that the content of the documents may tend to incriminate the individual. *Fisher v. United States*, 425 U.S. 391 (1976). There is, however, an exception to this rule when an individual was compelled by the

government to incriminate himself or herself by creating the documents in the first place. *Shapiro v. United States*, 335 U.S. 1 (1948).

Although an individual has no Fifth Amendment right to resist the production of documents because their *content* might be incriminating, the Court has recognized that the mere *act of producing* subpoenaed documents may carry separate incriminating implications. As the Court explained:

> The act of producing evidence in response to a subpoena ... has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the [individual producing the records]. It would also indicate the [individual]'s belief that the papers are those described in the subpoena.

Fisher, 425 U.S. at 410.

Fisher held that the Fifth Amendment protects an individual against any compulsion to incriminate himself or herself by such an act of production, because the conduct of producing the documents is essentially testimonial in nature.

The scope of the Fifth Amendment privilege extends only to instances where the compelled act of production would, in fact, carry incriminating implications. Under some circumstances, the individual's production of the subpoenaed documents will not be deemed to be incriminating because it conveys nothing the government does not already know. In *Fisher*, where the government subpoenaed documents that it was already aware of, the Court observed that "[t]he existence and location of the [subpoenaed] papers are a foregone conclusion and the [witness] adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." 425 U.S. at 411. Under these circumstances the Court held there was no Fifth Amendment right to withhold the documents because compliance was more like "surrender" of them than "testimony" about them. *Id.*; *see also United States v. Norwood*, 420 F.3d 888, 895 (8th Cir. 2005) (no Fifth Amendment protection where existence and location of documents a "foregone conclusion").

A much different factual setting was presented more recently, however, in *United States v. Hubbell*, 530 U.S. 27 (2000). There, the government sought categories of documents the existence and location of which it had no prior knowledge. The Court held that "the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions," *id.* at 41, in which it was "unquestionably necessary for [the witness] to make extensive use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the requests in the subpoena." *Id.* at 43. Under these circumstances, the Court held that *Hubbell*'s Fifth Amendment rights encompassed the compelled production of the documents pursuant to subpoena.

There is thus is a critical distinction between "foregone conclusion" acts of production--which have no Fifth Amendment protection under *Fisher*—and "fishing expedition" acts of production that are protected under *Hubbell*. Locating the dividing line between them turns on the level of the government's prior knowledge of the existence, location, and authenticity of the documents to be produced. If the case falls on the right side of the line, a witness faced with a potentially incriminating act of production may lawfully refuse to produce the documents altogether.

Litigation in the lower courts has begun to flesh out both the standard under *Hubbell* and the procedure for determining whether that standard has been met. The District of Columbia and the Ninth Circuit have established a "reasonable particularity" standard to determine "whether an act of production is sufficiently testimonial to implicate the Fifth Amendment." *United States v. Ponds*, 454 F.3d 313, 320–21 (D.C. Cir. 2006); *In re Grand Jury Subpoena*, 383 F.3d 905, 910 (9th Cir. 2004). Under this standard, a witness who believes the act of producing documents in response to a grand jury subpoena may add to the government's arsenal of incriminating evidence may move for a protective order prior to producing the documents. The burden then falls on the government to establish its knowledge of the existence, possession, and authenticity of the subpoenaed documents with "reasonable particularity" such that the communication inherent in the act of production can be considered a forgone conclusion. *Ponds*, 454 F.3d at 324. It may be necessary in this process for the witness to submit the documents in question to the court for in camera review. *See, e.g.*, *United States v. Bell*, 217 F.R.D. 335 (M.D. Pa. 2003) (utilizing *in camera* review); *United States v. Cianciulli*, 2002 WL 1484396 (S.D.N.Y. 2002) (same).

If the government carries its burden, it is entitled to production of the documents. If the government fails to carry its burden, it may obtain the documents only by extending both use and derivative use immunity to the witness. Where the government elects to confer immunity, the scope of the immunity extends not merely to the evidence of the act of producing the documents, but also to the *contents* of the documents themselves. *Ponds*, 454 F.3d at 321–22. Moreover, the contents of the documents obtained through the grant of immunity may not be used in *any* way, including merely refreshing the recollection of another witness. *Id*. at 322.

Given the implications of conferring immunity regarding the contents of subpoenaed documents, the government will likely be reluctant to confer such immunity on a target of its investigation. Moreover, the government may not need to use subpoenas in the cases where it could most easily establish the act of production would be a forgone conclusion. When it has information regarding the existence and location of the documents it seeks, this information may rise to the level of probable cause, which would enable the government to obtain a search warrant. But when the government is truly in the dark about what documents may be in the possession of a witness, the Fifth Amendment provides significant protections to a witness who prefers to keep the lights out.

Subpoenas to records custodians. Many federal crimes investigated with the use of a grand jury involve activities by legal entities as well as individuals. Such entities include not only corporations, but also labor unions and most partnerships. Grand juries typically obtain a legal entity's documents by issuing a subpoena to the custodian of the entity's records, and we first discuss the issues directly related to the production of such documents. We then turn to the additional issues raised by subpoenas seeking testimony related to the production of documents (such as authentication testimony) and subpoenas issued to former employees in possession of entity documents.

Records custodian subpoenas for documents. The Fifth Amendment law regarding entities themselves is well established: artificial legal entities have no privilege against self-incrimination under the Fifth Amendment. *United States v. White*, 322 U.S. 694, 700–01 (1944). The Supreme Court has offered various justifications for the collective entities doctrine, but the strongest factor was probably necessity; a recognition of the privilege would have made it nearly impossible to enforce the antitrust laws and many other statutes regulating corporate activity. *See generally* SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE, § 6:12 (2nd ed. 1997). Accordingly, corporate records must be produced in response to a grand jury subpoena regardless of their tendency to incriminate the entity. *United States v. Doe*, 465 U.S. 605 (1984). In the ordinary course of events, this makes grand jury subpoenas for corporate records straightforward. Even if the documents tend to incriminate not only the entity but also certain individuals associated with or employed by the entity, the documents must nevertheless be produced because they are the property of the entity and not the individuals. Where given a choice, entities typically designate as their custodians persons with no potential criminal exposure.

The picture becomes more complex, however, where the documents sought may tend to incriminate not only the entity, but also the records custodian personally. Although the entity has no Fifth Amendment privilege, an individual records custodian does have Fifth Amendment rights, but those rights are quite different than they would be if the subpoena sought personal records. The Supreme Court has long held that an individual cannot rely on a personal privilege against self-incrimination to avoid producing the records of an entity held by the individual in a representative capacity--even if the content of those records might be personally incriminating. *Bellis v. United States*, 417 U.S. 85 (1974). When an individual becomes a representative of an artificial entity, he or she undertakes certain obligations, including the duty to produce documents subpoenaed from the entity by the government. When acting in a representative capacity, the custodian acts for the entity, not the custodian. Because the entity has no privilege against self-incrimination, its agent likewise has no privilege.

Although the custodian must produce the corporate records regardless of the degree to which their *content* might incriminate the custodian, the Supreme Court has been more solicitous of the custodian's right to avoid incrimination as a result of the communicative aspects of *the act of production*. The Court addressed this tension between the custodian's Fifth Amendment rights regarding the act of production and the grand jury's

entitlement to the records of the entity lacking any Fifth Amendment rights in *Braswell v. United States*, 487 U.S. 99 (1988). The Court solved the dilemma with a compromise: the custodian must produce the records even if the act of producing them would incriminate the custodian, but the government is prohibited from making direct use of the act of production in any subsequent prosecution of the custodian. Because the custodian acts as a representative or agent, the custodian's acts are deemed to be the act of the entity and not that of the custodian personally. If the custodian is later tried on criminal charges and the government uses the documents the custodian produced, the government is permitted to inform the jury that the corporation produced the records. The government may not, however, disclose to the jury that the records were produced on behalf of the corporation by the custodian.

Although the *Braswell* Court did not use this term, it effectively created a limited form of immunity, which is automatic and self-executing. There need be no communication from the government nor order of the court conferring this protection on the custodian. It would be prudent, however, for counsel representing custodians to accompany the document production with a letter confirming that the documents are being produced by the custodian in a representative rather than individual capacity and that the custodian will be entitled to the protections of *Braswell* in connection with the production.

Note, however, that the informal immunity conferred by *Braswell* is limited to the government's direct use of the custodian's act of production. It does not appear to extend to the government's *derivative* use of the custodian's act of production in its investigation and prosecution of the custodian. *See In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d 173, 182 (2d Cir. 1999). Thus evidence discovered as a result of knowledge gleaned from corporate documents produced by the custodian may later be introduced to incriminate the custodian. In contrast, Fifth Amendment rights may only be overcome through a grant of both use and derivative use immunity. Under the rationale of *Braswell*, however, the custodian was not compelled to give up his or her Fifth Amendment claims, so the custodian is not entitled to true use and derivative use immunity. Instead, the limitation on the government's use of the evidence gained from the custodian—though it functions as a form of immunity—simply flows from the recognition that these acts are deemed to be the acts of the corporation, not of the custodian as an individual.

Braswell's automatic use immunity for custodians functions best when the entity at issue has many individuals associated with it, so that a jury would have no reason to assume that the documents in question were produced by the custodian on trial. But what about a custodian who is the only individual associated with the entity, such as a corporation with a single shareholder who is also the sole employee? Under this scenario, the protection of *Braswell* will be largely illusory, because the jury will almost certainly infer that if the documents were produced by the entity, the only person who could have done so is the defendant. The *Braswell* Court recognized this difficulty but declined to address it:

> We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian [can] establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.

This question remains an open one, though the lower courts addressing the issue after *Braswell* have declined to afford any additional protections for custodians of one-person entities. *See, e.g.*, *United States v. Amato*, 450 F.3d 46 (1st Cir. 2006); *In re Grand Jury Subpoena*, 21 F.3d 226 (8th Cir. 1994); *United States v. Stone*, 976 F.2d 909 (4th Cir. 1992). Nevertheless, while the issue remains unresolved by the Supreme Court, counsel representing custodians of one-person legal entities would be prudent to raise it and, if nothing else, preserve the matter for further review.

On the other hand, a sole proprietorship--meaning a business owned by an individual rather than an entity such as a corporation or partnership--is treated for Fifth Amendment purposes as an individual. A sole proprietorship has no established institutional existence separate from its owner, and is regarded as the owner's alter ego. *See Bellis v. United States*, 417 U.S. 85, 87–88 (1974); *Herman v. Galvin*, 40 F. Supp. 2d 27, 28–29 (D. Mass. 1999); *In re Tower Metal Alloy Co.*, 200 B.R. 598, 605–06 (Bankr. S.D. Ohio 1996). Thus subpoenas to sole proprietorships should be addressed under the framework we discussed above regarding subpoenas to individuals. . . .

Problem 13-1

(a) Your client Shirley is in your office again for that initial interview. But this time, about halfway through the meeting, she says this: "Huh. I don't know if this matters. But I just remembered that I put some comments about one of my meetings with Edgar about stock trades in my diary. I like to write about my day before I go to sleep at night. I usually keep my diary next to my bed but I think it's in an extra handbag that I left at the office today." Advise Shirley about the diary (and ask her about any additional facts you might need).

(b) Same as above, but Shirley tells you that she put the comments about the meeting with Edgar on the Notes app on her iPhone. Advise Shirley (and ask her about any additional facts you might need). Might it matter whether Shirley (i) has one phone that she uses for all personal and work matters and that she pays for, (ii) same single phone but Shirley's company reimburses her for part of the monthly bill, (iii) same single phone but the company pays 100% of the monthly bill, or (iv) Shirley has two phones, one for personal matters that she pays for and the other for work matters that the company pays for, but Shirley has a single iCloud account?