

OFFICIAL TRANSCRIPT

ORIGINAL

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v. WEBSTER L. HUBBELL.

CASE NO: 99-166 C. |

PLACE: Washington, D.C.

DATE: Tuesday, February 22, 2000

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IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES,

4 Petitioner :
.....

5 v. . . . NO. 99-166

6 WEBSTER L. HUBBELL.

8 Washington, D.C.

9 Tuesday, February 22, 2000

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:13 a.m.

13 APPEARANCES:

14 RONALD J. MANN, ESQ., Ann Arbor, Michigan; on behalf of
15 the Petitioner

16 MICHAEL R. DREBEN, ESO., Deputy Solicitor General.

17 Department of Justice, on behalf of the United States
18 Department of Justice, as amicus curiae, supporting
19 Independent Counsel

20 JOHN W. NIELDS, JR., ESQ., Washington, D.C.; on behalf
21 of the Respondent.

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| 5 | MICHAEL R. DREEBEN, ESQ. | |
| 6 | On behalf of the United States Department of | |
| 7 | Justice, as amicus curiae, supporting | |
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PROCEEDINGS

(10:13 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 99-166, United States v. Webster Hubbell.

Mr. Mann.

ORAL ARGUMENT OF RONALD J. MANN

ON BEHALF OF THE PETITIONER

MR. MANN: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents a question about the

privilege against self-incrimination in the context of the compelled production of documents. Specifically, does the privilege extend not only to the compelled testimonial communications, the witness' admissions that the documents exist, that they're in his position -- possession and that that they respond to the subpoena, but also to other voluntarily recorded information that is contained in the documents?

Now, it's common ground that the contents of the documents were not privileged before the compulsion. Although they would have been privileged under Boyd, your decision in Fisher rejected that view.

The issue before the Court today then is whether the way in which the Government obtained those documents through a compelled act of production taints what

1 otherwise would not be privileged.

2 Now, respondent gives us a categorical answer
3 that in any compelled testimonial admission of existence
4 always automatically taints the contents of the produced
5 documents.

6 QUESTION: How -- how long was the witness
7 before the grand jury to explain all these documents?

8 MR. MANN: It would have been a matter of just a
9 few minutes. And the -- the questions that were asked in
10 the grand jury are the questions that we ask typically
11 pursuant to the U.S. Attorney's manual. It's basically
12 restating the things that are the implicit testimonial
13 admissions that the Court identified in Fisher.

14 QUESTION: He -- he was there for just a few
15 minutes?

16 MR. MANN: The testimony was -- was for just a
17 few minutes. I really don't know how long he was
18 actually, you know, in the grand jury.

19 QUESTION: I thought that he had to identify
20 each document. Obviously, what I'm concerned with is if
21 you have a witness before a grand jury for any length of
22 period, some grand jury would say, oh, he looks shifty or
23 he's not looking me in the eye, all the things jurors
24 think about. And -- and it seems to me there is a high
25 degree of risk involved when you have a subpoena of this

1 scope and of this sort, a risk of incriminating the person
2 -- person through his testimony.

3 MR. MANN: Well, I think that that's true, but I
4 think that in this particular case and I think in most
5 cases where you have a production of documents, you have
6 to distinguish between the things that the witness is
7 forced to say, implicitly or explicitly -- and in this
8 case, I think those things were much the same -- and the
9 contents of the documents.

10 And in this case -- and I think in many cases -
11 - we don't have to use and we didn't use in any way any of
12 the things that he said. I mean, all we're using is the
13 information that was in the documents. I think the -- the
14 key for us to this case is that it's not relevant that we
15 got the documents from respondent.

16 QUESTION: Well, but did you -- did the
17 Government know about the contents of the documents ahead
18 of time?

19 MR. MANN: No. We absolutely did not know about
20 the contents of the documents, but --

21 QUESTION: You had -- you had no idea what --
22 what you were going to find.

23 MR. MANN: Well, I mean, I think no idea is
24 probably something of a stretch, but we certainly are not
25 in a position to prove that we knew with reasonable

1 particularly what the documents contained.

2 QUESTION: And it was only by virtue of the
3 production of the documents that you learned the facts
4 that enabled you to then carry out a prosecution.

5 MR. MANN: That's absolutely right, but I think
6 it's important to -- to remember that it's clear, in the
7 cases that the Court has had since Kastigar, in Fisher and
8 in the other cases interpreting the statute, that it's not
9 a problem for the Government to show that we would not
10 have the incriminating information but for the compelled
11 act of production. It's perfectly clear that there are
12 circumstances in which we can force a witness to speak --

13

14 QUESTION: What do you have to show? That you
15 had an independent source of the information or what?
16 What is it?

17 MR. MANN: Well, I think -- I think analytically
18 that's a good way to put it. Kastigar, of course, does
19 say that the Fifth Amendment permits the Government to use
20 things it gets from an independent source.

21 We look at Fisher as explaining that the act of
22 production has a twofold nature, that the act of
23 production itself is physical, non-testimonial conduct.

24 QUESTION: Mr. Mann, you didn't answer Justice
25 O'Connor's question. What do you have to show?

1 MR. MANN: Well, I think what we have to --

2 QUESTION: Do you have to show anything?

3 MR. MANN: I think what we -- I don't think we
4 have to show anything about our quantum of knowledge of
5 the contents of the documents.

6 QUESTION: What do you have to show?

7 MR. MANN: I think we have to show, once --
8 under Kastigar, once a defendant shows that he's been
9 compelled to testify, the burden shifts to us to show that
10 we did not use any of his compelled testimonial
11 communications. And in this context --

12 QUESTION: No. I meant do you have to show
13 anything before you served the subpoena or to get the
14 subpoena?

15 MR. MANN: Oh, well, to get the subpoena, we
16 have to satisfy the regular standard under R. Enterprises
17 and then the regular standard under the Federal Rules of
18 Criminal Procedure to show that we have a basis for
19 issuing a subpoena. Now, that standard is -- is not
20 difficult for grand juries to satisfy.

21 QUESTION: Well, do you have to show anything in
22 addition in order to satisfy the Fifth Amendment, that you
23 had -- that -- that these are documents or -- or items
24 that everyone knows exists, something like that?

25 MR. MANN: No, I -- I think we do not. I mean,

1 if we don't -- if we don't know anything about the
2 contents of the documents, that does not in any way, it
3 seems to me, affect the logical relation between the
4 things he says when he's under compulsion --

5 QUESTION: So, if everybody knows that the
6 defendant, the target, has guns in his house, you can have
7 a subpoena say bring all guns that are in your house to
8 the grand jury.

9 MR. MANN: I think that that's perfectly
10 permissible under the Court's decisions in Schmerber. I
11 mean --

12 QUESTION: Well, how -- how do you distinguish
13 -- what is magical about documents?

14 Let's -- let's use a gun. Suppose -- suppose
15 there's a murder. You -- you have the bullet that caused
16 the death, and you -- you also know that the defendant has
17 purchased a gun of the same caliber. You serve a subpoena
18 on the defendant saying, turn over this gun which -- which
19 you -- you are shown -- we know you own it. Are you
20 entitled to get that gun?

21 MR. MANN: Yes. Now, let me explain. See,
22 that's exactly the point.

23 QUESTION: And then you get the gun. You do a
24 ballistics test on it. You find that that is, indeed, the
25 bullet that -- that caused the murder, and -- and this

1 has --

2 MR. MANN: Well --

3 QUESTION: -- not been compelled testimony?

4 MR. MANN: The difficulty, of course, in that
5 case is it might be that we would have difficulty in
6 proving that the gun had been in the possession of the
7 defendant, if that was relevant to us. But if we
8 independently can match up the gun to the defendant --

9 QUESTION: It's registered. He bought it from a
10 -- you know, in a State where all handguns purchases have
11 to be registered.

12 MR. MANN: But, see, that goes to your initial
13 thing. You said, what's special about documents? I think
14 that what Fisher establishes is there's nothing special
15 about documents. What the Constitution does is it breaks
16 up production of evidence into two classes of cases.

17 QUESTION: You're -- you're accepting my gun
18 hypothetical, and you say that the Government is entitled
19 to demand of the defendant, who has squirreled away the
20 gun -- he's actually the murderer. He's hidden the gun
21 somewhere.

22 MR. MANN: Well now, of course --

23 QUESTION: The Government can come to him and
24 say, turn over the gun with which you committed the
25 murder.

1 MR. MANN: Well, I guess I'm --

2 QUESTION: And then you can introduce it in

3 evidence and use it against him at trial. Right?

4 MR. MANN: It's obviously more difficult for the

5 Government if the Government subpoena says turn over the

6 gun with which you committed the murder because they're

7 going to have a heavier --

8 QUESTION: Well, they don't say that --

9 MR. MANN: If we say --

10 QUESTION: -- turn over the gun.

11 (Laughter.)

12 MR. MANN: Suppose that the subpoena says, turn

13 over all guns in your possession.

14 QUESTION: Not all guns. Just -- just this gun.

15 MR. MANN: This particular gun.

16 QUESTION: The .38 caliber automatic that you

17 are shown to have purchased.

18 MR. MANN: Okay. I would respond to you with

19 the hypothetical that Justice Stevens has in his dissent

20 in the second Doe case where he -- in -- which the Court

21 accepted as being the line that you've drawn in your cases

22 past Schmerber. If what we do is we tell the defendant

23 give us the key to the strong box, it's full of

24 incriminating documents, the answer is he has to give us

25 the key. If we tell him, tell us the combination to the

1 safe, we can't make him do that.

2

3 What the Constitution says is it doesn't care
4 what we get, it doesn't care where we get it, it doesn't
5 matter if we get it from the defendant. The Government
6 has a right to every man's evidence, the Court in Kastigar
7 emphasized. What it cares about is how we get it. If we
8 get the evidence by forcing the defendant to tell it to
9 us, if we force him to restate, repeat, or affirm the
10 information, well, then we lose. And so, if we make him
11 tell us the combination to the safe, if we make him tell
12 us the information we want, well, then we lose. But if
13 what we do is we force him to the physical act of handing
14 it to us, that's permissible.

15 QUESTION: You can't make him tell you where the
16 gun is. You can only make him go get the gun and give it
17 to you.

18 MR. MANN: Absolutely. The --

19 QUESTION: And you -- you think that -- that is
20 a sensible distinction.

21 MR. MANN: I think it's a distinction that the
22 Court has had to draw. If you look at the opinions in
23 Schmerber and Kastigar, the Court looks at two important
24 policies founded in our history.

25 One policy is the principle that the Government has

1 the right to every man's evidence, and the Court talks
2 about at great length about how important this is.

3 At the same time --

4 QUESTION: Well, that's your -- that's your
5 Schmerber point, but I don't see how Schmerber is -- is
6 helpful to you here because Schmerber -- the instance in
7 which the individual, in effect, makes his bodily -- body
8 available for the drawing of the blood sample and so on,
9 Schmerber does not involve the implicit representations
10 that are made, for example, in this case when the
11 documents are produced or in Justice Scalia's hypothetical
12 when the individual implicitly indicates that, yes, the
13 gun is in his possession by -- by turning it over. I -- I
14 don't see Schmerber as being help to you at all.

15 MR. MANN: Well, Schmerber involves I think a
16 unitary act of production, and according to the Court in
17 Schmerber, it -- that one was analyzed as wholly non-
18 testimonial. So, what we have today is an act of
19 production that under Fisher has two natures to it. It's
20 a physical, non-testimonial act of production. At the
21 same time, it has implicit within it a testimonial
22 communication.

23 So, the question for the Court is to decide,
24 although the act is not privileged, the communications
25 are. And so what you have to decide is do the contents of

1 the documents come from the testimonial portion of the act
2 or do they come from the conduct.

3 QUESTION: Well, I -- I think the documents that
4 were subpoenaed here may be an easier case for you than
5 Justice Scalia's gun hypothesis because presumably
6 virtually anyone has tax records and accounting records.
7 It's no confession to say that -- to say that those exist
8 and that they're in the person's possession.

9 MR. MANN: And I -- I think that goes to our --
10 the second question presented, which the second question
11 presented suggests that if the quantum of evidence that we
12 have about the documents reaches a certain level, then --
13 then it's -- then it's a foregone conclusion that he has
14 them.

15 And our view as to what Fisher says is that if
16 we're asking for simple business records, the Fifth
17 Amendment simply isn't implicated in the same way --

18 QUESTION: Mr. Mann, aren't you stretching
19 Fisher? Fisher was specific documents that had been in
20 the hands of the accountant, specific documents that the
21 accountant used to file tax returns, and says, turn those
22 documents, lawyer, over to the grand jury. They went from
23 the client to the accountant to the lawyer. But that was
24 documents used by the accountant to file tax returns.

25 This subpoena is far more sweeping and seems to

1 resemble the one in Doe I much more than the one in
2 Fisher. So, if we're just going by what the Court held in
3 those two cases, Fisher, particular documents; Doe,
4 broader documentary disclosure, generically described, as
5 in this case, then one would say, well, if we just go on
6 how the Court came out at the end of the line, in Fisher
7 the -- the Government lost -- the Government won, and in
8 Doe I the Government lost. This case is more like Doe I.
9 End of the case.

10 MR. MANN: Well, on the foregone conclusion
11 point, that may be true if you look -- if you look at it
12 that way, but I think one problem with that analysis is
13 that in Doe I, the Court, of course, did not itself
14 examine the subpoena. The Court's opinion says that it's
15 accepting the factual findings of the lower court and
16 accepting the lower court's view on that. And that's not
17 really the question that the Court addresses.

18 But in any event, in --

19 QUESTION: But the Court had the subpoena before
20 it and it was one of these sweeping subpoenas that asked
21 for all kinds of documents.

22 MR. MANN: Well, with all due respect, I don't
23 think it -- I don't think that the subpoena here is
24 significantly broader than the subpoena in Fisher.

25 But I think the most important point is to

1 emphasize the relation between the foregone conclusion
2 doctrine that's at the heart of Justice O'Connor's
3 question and your question, and the principal question
4 that -- that's presented in this case because our -- our
5 main submission is that even if we would not prevail on
6 the foregone conclusion doctrine, so even if this
7 production includes a testimonial incriminating admission,
8 the -- the important point in the case is to decide
9 whether the contents of the documents are derived from
10 that communication. And on that point, I think we're on
11 very solid ground under Fisher and Doe.

12 QUESTION: Let -- going just back to the gun
13 hypothetical, I give you two hypotheticals. Subpoena A:
14 produce all the guns that are in your possession and it's
15 generally known that the man has lots of guns. Subpoena
16 B: produce the Smith and Wesson .38 with ivory handles
17 and the initial K. Difference in those two cases?

18 MR. MANN: No. Our view is that in either case
19 we can get him to produce -- in either case he's required
20 to provide the guns to us.

21 Now, we have obtained from him a slightly
22 different testimonial admission in the two cases, but in
23 most prosecutions, it strikes me that -- that neither of
24 those will be --

25 QUESTION: No, no. There's a big difference.

1 QUESTION: Well, Mr. Mann, let -- let me ask you
2 this in relation to the gun. If you were to get a search
3 warrant and go out and search the residence for a gun,
4 what would you have to show the magistrate to get that
5 warrant?

6 MR. MANN: Well, I think we probably would have
7 to show -- well, we obviously would have to show probable
8 cause, and the question is what would probable cause
9 require. And I think in most cases probable cause would
10 require considerably less than -- than --

11 QUESTION: Some reason to think that he has
12 something that you might find that's relevant to the
13 crime.

14 MR. MANN: Absolutely.

15 QUESTION: And do you think you have to show
16 more or less to issue a subpoena to say, give me all your
17 guns?

18 MR. MANN: We obviously have to show less to get
19 a subpoena, but the reason for that is because when you
20 get a search warrant, you're going out into somebody's
21 house. You're intruding in somebody's reasonable
22 expectation of privacy in their home, and so the Court has
23 articulated a relatively high standard for that relatively
24 intrusive method of obtaining information from citizens.

25 QUESTION: Yes, but what the -- what the person

1 being searched really cares about is the fact that you are
2 intruding for the purpose of getting evidence. The
3 concern of the person who objects insofar as the criminal
4 courts are concerned is exactly the same in each instance.

5 MR. MANN: But the concern of the Constitution
6 is entirely different. The Constitution is not the least
7 bit concerned if we prosecute and convict somebody by
8 evidence that we compulsorily obtain from him. That is
9 completely legitimate. That is emphasized repeatedly --

10 QUESTION: Mr. Mann, could I just supplement the
11 question Justice Kennedy asked about a specific gun and
12 all guns in your house? What if you don't have any idea
13 that a person ever owned a gun or had it? Could you serve
14 him with a subpoena and say, please produce all the guns
15 in your possession --

16 MR. MANN: I -- I think it's --

17 QUESTION: -- just because he's a suspect in the
18 case?

19 MR. MANN: Well now, see, once you say that he's
20 a suspect in the case, I think at that point you're saying
21 that we had some reason to suspect him, which probably is
22 enough reason to issue a subpoena. You can't say --

23 QUESTION: Would you have to prove that you had
24 some -- what does it take to be a suspect in the case?

25 MR. MANN: Well, it takes --

1 QUESTION: You just have a hunch. This fellow
2 -- he's a bad guy. He might have some guns. Can you go
3 out and serve a subpoena on him?

4 MR. MANN: Well, yes. I mean, I think -- I
5 think the hunch is the R. Enterprises standard.

6 QUESTION: And ask for all his guns?

7 MR. MANN: Under the R. Enterprises standard, I
8 think that having a hunch is more or less what the
9 standard is. I mean, the Court -- the Court looks at this
10 and says grand juries traditionally have had very broad
11 investigatory powers, and the -- the requirements of
12 knowledge up front to get to issue subpoenas are
13 relatively small.

14 The -- the key for us is this is not a testimony
15 of communication. The act might include one --

16 QUESTION: But if -- if it's that broad, why has
17 it been so rarely used in the past?

18 MR. MANN: Well, it's not at all clear I think
19 that it's been rarely used. I mean, for one thing, in
20 your own decisions you'll see that we've been up here
21 several times since Fisher presenting more or less the
22 same question to you. It's the -- the implications of it,
23 compelled production of documents, have been up here
24 several times.

25 Another problem you would see, to the extent

1 that it's not used as frequently as you might expect, is
2 of course the law is really quite uncertain, and anytime
3 you do this, you're likely to be faced with what the Court
4 discussed in Braswell, which is once we force him to say
5 something that includes any compelled testimonial
6 admission, we're faced with a Kastigar hearing which is
7 going to slow down a prosecution. If we can obtain
8 evidence in a way that we know is completely permissible,
9 which we can't do in this area ever at the moment, then we
10 don't have to worry about a Kastigar hearing. I mean, I
11 think the real problem is that the law is very uncertain,
12 but even with the uncertainty, there have been enough
13 prosecutions that this issue has been coming up to the
14 Court repeatedly since Fisher.

15 QUESTION: Mr. Mann, may I ask a question about
16 the -- initially the Fifth Amendment privilege was
17 claimed. You said, okay, we give you immunity. We give
18 you use immunity. If I understand your position, what you
19 gave -- the immunity that you gave immunized nothing, and
20 if that's the case, wasn't there a certain deception
21 involved in saying, okay, yes, he's got Fifth Amendment
22 privilege? We give him immunity, and then the immunity
23 shields nothing.

24 MR. MANN: Well, I don't think that that's
25 right. I think that the immunity we gave is the immunity

1 that the statute grants, and the genius of the statute is
2 that it avoids the necessity to litigate at the time of a
3 production over the --

4 QUESTION: What did -- what did the immunity
5 give to Hubbell?

6 MR. MANN: I mean, in this particular case, the
7 immunity would prevent us from introducing into evidence
8 or using in our investigation the fact that Mr. Hubbell
9 possessed these documents. It would prevent us from using
10 in the investigation --

11 QUESTION: Well, isn't it obvious they're the
12 papers that were used to -- to bill, to make tax records,
13 that -- his phone records, his -- his schedule, that they
14 obviously came from him?

15 MR. MANN: Well, if it's evident -- if it's
16 evident on their face that they came from him, then that
17 might mean we don't need to use his testimonial
18 communication against him. But that's a harder question
19 that's not presented here because here we have no need to
20 establish that these documents came from him. These are
21 not offenses as for which his possession of these
22 documents has the least bit of relevance.

23 If we had to establish his possession of these
24 pieces of paper, we would have something of a Kastigar
25 problem, and --

1 QUESTION: -- for his production of them. If -
2 - if his production of them is incriminating, he --

3 MR. MANN: That would be -- that would be a
4 problem for us. I mean, my general theory would be we
5 would lose. If we had to prove that he possessed these
6 documents and his production was the best way to do it, we
7 would lose. I mean, assume, for example --

8 QUESTION: The very fact that you were using
9 these documents rests upon the fact that -- or -- strike
10 that.

11 The very fact that you were using the
12 information that you gained from these documents rests
13 upon the fact that, on the production of the documents,
14 their existence and authenticity were represented to you.
15 You are not directly proving possession, and you are not
16 directly proving the authenticity by use of the
17 production. But what you do use you are using as a result
18 of the production which has these implications. And so,
19 it seems to me it's very difficult for you to argue that
20 the use that you are making is not a use which is
21 dependent upon the representational aspect of the
22 production.

23 MR. MANN: I think it's actually quite easy for
24 us to argue, and I think it's easy for the reason that you
25 said. We're using these things because he produced them

1 to us. He produced them to us in the same way he would
2 produce a handwriting exemplar or something else.

3 I think what -- that the heart of the case is
4 just a judgment call. Did we force him to give us the
5 documents, which is perfectly permissible? Or did we
6 force him to tell us the information? We didn't force him
7 to tell us anything of value. Everything of value in the
8 documents is information that was voluntarily recorded
9 long before we brought compulsion to bear.

10 QUESTION: Your position then is basically that
11 your -- this situation is no different for you than if you
12 had found the documents on the doorstep of the Justice
13 Department.

14 MR. MANN: Yes, that's exactly right.

15 If I may reserve the rest of my time.

16 QUESTION: Very well, Mr. Mann.

17 Mr. Dreeben, we'll hear from you.

18 ORAL ARGUMENT OF MICHAEL R. DREEBEN

19 FOR THE UNITED STATES DEPARTMENT OF JUSTICE,

20 AS AMICUS CURIAE, SUPPORTING INDEPENDENT COUNSEL

21 MR. DREEBEN: Thank you, Mr. Chief Justice, and
22 may it please the Court:

23 To properly assess the effect of a grant of use
24 immunity in a documentary subpoena context, it's necessary
25 to separate out the two components of what is compelled by

1 the subpoena.

2 First, the subpoena compels a physical act, the
3 transfer of documents from the witness to the Government.

4 Second, the subpoena also compels the witness to
5 make certain implicit testimonial admissions about that
6 the responsive documents exist, that they are in his
7 possession, and that the production to the Government will
8 transfer the documents to the Government.

9 Now, the witness is protected by the Fifth
10 Amendment only with respect to the testimonial components
11 of the act of production, not with respect to the physical
12 act itself that transfers the documents.

13 QUESTION: Mr. Dreeben, I -- I gather that means
14 that your answer to my hypothetical earlier would be that
15 there is no Fifth Amendment problem in requiring a person
16 to turn over the handgun which -- which was used in the
17 commission of a murder.

18 MR. DREEBEN: No, Justice Scalia. I think that
19 there's a substantial Fifth Amendment claim that the
20 witness has, that possession of that handgun is highly
21 incriminating, and as a result, the witness can assert the
22 Fifth Amendment and require the Government to give the
23 witness act of production immunity if the Government
24 wishes to enforce the subpoena.

25 The question then becomes --

1 QUESTION: But the only thing the Government
2 can't use is the fact that he turned it over to prove that
3 he possessed it. The Government could come in and show
4 the record that he purchased it and -- and leave it to the
5 jury to surmise that he still continued to have it at the
6 time of the murder. Right?

7 MR. DREEBEN: Well, the Government has to show
8 that it does not use anything testimonial in the
9 investigation that leads up to the prosecution.

10 QUESTION: But the Government could show at the
11 trial that the murder was committed with a handgun that
12 had been purchased by Mr. X.

13 MR. DREEBEN: It would need to do at least that,
14 and it would also need to show that it did not make use,
15 as an investigatory lead, of its knowledge that this
16 witness possessed the particular item.

17 QUESTION: Could we go to the other part of
18 Justice Kennedy's hypothetical? I understand and will
19 assume you're right on two things.

20 I assume that the problem of knowing that these
21 -- there's a reasonable possibility that the person has
22 material like this is a kind of Fourth Amendment problem
23 that may be in rule 17 and some cases of the Court, but
24 don't concern us here. I put it to the side.

25 I'm also putting to the side and assuming you're

1 absolutely right that you can get the single gun that you
2 know exists and just give him the production immunity.

3 But there's a second assertion here. One is the
4 assertion I have the thing. Okay? We give him use
5 immunity for that. The other is the assertion the thing
6 exists.

7 Now, in respect to that statement, the thing
8 exists, it creates a problem only where you are
9 subpoenaing hundreds of things because if you ask for a
10 year's worth of tax checks, it's certainly very possible
11 that four of those checks, unbeknownst to you, turn out to
12 be pure gold. That's why they have a subpoena, and you
13 didn't know before he brought these into the room that
14 those four checks existed. All you asked for were all his
15 tax records.

16 Now, every case that we've had, including Doe I,
17 which is what Justice Ginsburg pointed out, suggests that
18 there is a Fifth Amendment problem in that statement, the
19 thing exists. And where the Government doesn't
20 independently know that the thing exists, they are using
21 the testimonial response to the question, does that thing
22 exist.

23 Now, that seems to me to be the problem that the
24 Second Circuit, this circuit, that Doe I, that our Fisher
25 use of the word existence, et cetera is -- is focusing on.

1 And I'd like you to focus on that.

2 MR. DREEBEN: Justice Breyer, I think, first of
3 all, the -- the notion that the subpoena respondent says,
4 the thing exists, is not a meaningful statement and is not
5 one that the Court's cases actually contemplate as being
6 the testimonial statement. I realize the Court has said
7 that, but the only meaningful statement that a respondent
8 can make is that responsive documents exist, which is a
9 way of correlating what the subpoena calls for with what
10 the documents actually say.

11 And the Government may not use -- make use of
12 the mental act that the witness uses to correlate
13 documents with a subpoena. That is most significant and
14 most important when the document itself is, for example, a
15 list of numbers and the witness produces it under a
16 subpoena specification that calls for give me all
17 itemizations of your income. In such a case, we cannot
18 interpret the document or make use of it without taking
19 advantage of the witness' mental faculties.

20 QUESTION: Do you know how long the defendant
21 was before the grand jury?

22 MR. DREEBEN: I don't. This was not our
23 prosecution, Justice Kennedy.

24 QUESTION: Well, I -- I understand that, but I
25 -- I can't seem to get an answer. We were told, oh, just

1 a few minutes, but it takes me more than a few minutes
2 just to read through the whole subpoena on page 47 and 49.
3 And I understood that they asked him with reference to
4 each paragraph of the subpoena, have you produced these
5 documents, which means that there's a very high risk that
6 you're going to be probing the perception, the cognition,
7 the memory, the knowledge of this witness. And we're
8 talking about risk here, it seems to me, in large part.

9 MR. DREEBEN: Well, I think the case comes to
10 the Court, Justice Kennedy, on the assumption that the --
11 the actions of Mr. Hubbell, sitting in a grand jury, do
12 not change the essential testimonial representations that
13 were made.

14 QUESTION: The case comes before the Court on
15 the assumption that you can use this subpoena of this
16 breadth in every drug prosecution that the Government
17 brings, as I understand it.

18 MR. DREEBEN: And the result of that is that we
19 would be --

20 QUESTION: And I think there's a very serious
21 problem of prosecutorial overreaching with that.

22 MR. DREEBEN: The problem exists if we make use
23 of what is testimonial and what the witness is compelled
24 to do. If we do not make use of what is testimony, we are
25 not trenching on Fifth Amendment values.

1 QUESTION: It's very odd to me, in response to
2 Justice O'Connor, that -- the counsel has conceded, as he
3 must, that you have to have probable cause -- you can now
4 have a witness come live, a target of investigation,
5 before a grand jury with less than probable cause. That's
6 astounding to me.

7 MR. DREEBEN: Well, we can bring witnesses
8 before the grand jury with less than probable cause. The
9 very purpose of the grand jury is to determine whether
10 probable cause exists.

11 QUESTION: Well, I -- I understand that, but
12 with reference to requiring him as well to bring documents
13 covering a tremendously broad description.

14 MR. DREEBEN: I think that the essential
15 position that we have taken responds to the fact that in
16 Fisher and in Doe this Court overruled the doctrine of
17 Boyd under which the notion was that the contents of the
18 documents themselves were testimonial and that a witness
19 was being compelled to testify by producing those
20 contents.

21 What Fisher and Doe require the Court to do is
22 separate out that which is testimonial in an act of
23 production from that which is not.

24 QUESTION: Would your argument change if the
25 defendant were before the grand jury for 3 hours

1 responding to every paragraph of this subpoena to see if
2 he complied with it?

3 MR. DREEBEN: The argument would change only
4 insofar as there is a greater chance that more testimony
5 that is protected would go before the grand jury and
6 potentially influence --

7 QUESTION: So, we are concerned with risk.

8 MR. DREEBEN: Yes.

9 QUESTION: Mr. Dreeben, I -- I had the -- have
10 been making the assumption that the Government makes use
11 of section 6002 immunity provisions to compel testimony
12 from witnesses largely in a third party context, in other
13 words, getting evidence that way from a third party to use
14 against another criminal defendant. How often does the
15 Government turn around and prosecute the very person who
16 is given the immunity under section 6002? Is that unusual
17 at all?

18 MR. DREEBEN: It is relatively unusual, but far
19 from unheard of. And one of the principal reasons why it
20 is not done is that under our view of the law, there is
21 still a significant Kastigar issue that the Government has
22 to get over. If we show that we made no use whatsoever of
23 any of the act of production, but only the contents of the
24 records, that's fine. But it may be difficult to show
25 that if the witness produces records that take on their

1 meaning only from being correlated with the subpoena or
2 would suggest that he had knowledge of their contents.

3 The witness --

4 QUESTION: Well, and -- and the language of
5 section 6002 itself is sort of broad: No other
6 information compelled under the order or information
7 directly or indirectly derived from it may be used against
8 the witness. I mean, that's pretty broad.

9 MR. DREEBEN: This Court said in Kastigar and
10 also in United States v. Apfelbaum, which is at 445 U.S.
11 115, that 6002 was intended to go as far as but no further
12 than the Fifth Amendment. What the --

13 QUESTION: Well, certainly that language goes
14 pretty far, doesn't it?

15 MR. DREEBEN: Well, the language I think was
16 written against a backdrop of Boyd in which the contents
17 of the records were protected, and so if the witness were
18 compelled to produce private papers that he had created,
19 that created a Fifth Amendment issue. But the intent of
20 the statute and this Court's construction of it has been
21 to make it coextensive with the Fifth Amendment.

22 QUESTION: Thank you, Mr. Dreeben.

23 Mr. Nields, we'll hear from you.

24 ORAL ARGUMENT OF JOHN W. NIELDS, JR.

25 ON BEHALF OF THE RESPONDENT

1 MR. NIELDS: Thank you, Mr. Chief Justice, and
2 may it please the Court:

3 My client was indicted in this case at least in
4 part as a result of the fact that under immunity he told
5 the truth. The thing that he told the truth about was
6 what documents he had that were responsive to the
7 subpoena. If he had been untruthful and withheld those
8 documents, the independent counsel wouldn't have had them,
9 but instead he told the truth, turned them over, and the
10 independent counsel used those documents to bring this
11 case.

12 QUESTION: Well, he didn't have much choice
13 except to tell the truth, did he, when he was before the
14 grand jury?

15 MR. NIELDS: No, and that was because he had
16 asserted his Fifth Amendment privilege respectfully
17 declining to state whether he had any documents, and he
18 was compelled to state whether he had any by the immunity
19 order. And then, Your Honor, that's absolutely right, but
20 -- but with an immunity order, the Government is required
21 to hold the defendant harmless from the truth that he
22 tells. And in this case, instead of holding him harmless,
23 they used the documents that he revealed to them,
24 truthfully revealed to them, to bring this indictment.

25 And, Justice Kennedy, in response to your

1 question, he -- he was in front of the grand jury for 17
2 minutes. And the reason he was there for that length of
3 time is that they needed him to tell them what documents
4 he had that were responsive.

5 QUESTION: Mr. Nields, what -- what is your
6 position with respect to your client's production? What
7 -- what was the incriminating aspect of it?

8 MR. NIELDS: The incriminating aspect of it was
9 that he told them what documents existed and were in his
10 possession --

11 QUESTION: You mean he -- he told them by
12 speaking not just by producing?

13 MR. NIELDS: Both. In all cases a witness will
14 answer the question, the effective question, what
15 documents do you have? What incriminating documents do
16 you have that are responsive? He answers that question by
17 producing or not producing documents.

18 QUESTION: And how did -- how did that
19 incriminate him?

20 MR. NIELDS: It led the Government to get
21 incriminating documents.

22 QUESTION: Well, but is that the test? I don't
23 think that's the test laid down in Fisher.

24 MR. NIELDS: Fisher doesn't deal, of course,
25 with immunity, but what Fisher says is that the -- the

1 testimony that is involved -- and the first thing that it
2 says is the testimony involved is that the documents exist
3 and are in the witness' possession because everybody who
4 responds to a subpoena is required to say -- tell the
5 Government what documents he has.

6 QUESTION: What if the Government subpoenas
7 income tax -- copies of income tax forms and records?
8 They don't ask for incriminating anything. Give me your
9 income tax forms and records for years 5 and 6.

10 MR. NIELDS: I would have to answer that in two
11 parts. The first question is whether there's testimony,
12 and that depends on whether possession of income tax
13 returns is a foregone conclusion.

14 QUESTION: Well, for most people it is. Is it
15 or isn't it?

16 MR. NIELDS: It may be. The case -- the only
17 case I'm aware of, decided in the courts of appeals, has
18 held that it's not a foregone conclusion that the person
19 has kept a copy because there is no legal obligation to
20 keep a copy. But -- but that is a close question I would
21 submit.

22 But in answer to, I think, Mr. Chief Justice's
23 question, the point is this, that the Fifth Amendment
24 since 1892 has protected a person from making disclosures
25 or statements that --

1 QUESTION: The Fifth Amendment was adopted in
2 1791 I think. What happened in 1892 to change it?

3 MR. NIELDS: Counselman against Hitchcock was
4 decided, Your Honor, and this Court --

5 QUESTION: Well, that presumably interpreted
6 the --

7 MR. NIELDS: Yes.

8 QUESTION: -- the law --

9 MR. NIELDS: Yes.

10 QUESTION: -- rather than changed it I trust.

11 MR. NIELDS: You're correct. I believe since
12 the adoption of the Bill of Rights.

13 But this Court pronounced in Counselman that a
14 witness is privileged from giving testimony that is
15 innocuous in itself that will lead the Government to
16 obtain other incriminating evidence.

17 And -- and what -- what happens in these
18 document subpoena cases or the gun subpoena case, is that
19 it may or may not be incriminating for the witness to say
20 this document exists, but if the document is one which
21 will cause him to lose his liberty and if the Government
22 only gets it from him because he truthfully discloses in
23 response to the subpoena that it exists, then that is
24 privileged --

25 QUESTION: Well, why doesn't that apply to your

1 -- to the income tax question that Justice O'Connor said?

2 Give me your income tax return for the year X.

3 MR. NIELDS: It does.

4 QUESTION: The Government says, we've lost ours.

5 Give us yours.

6 MR. NIELDS: It does. The reasoning applies
7 perfectly unless --

8 QUESTION: Well, but then --

9 MR. NIELDS: -- the Court holds that it's a
10 foregone conclusion that he possessed it, in which case
11 Fisher --

12 QUESTION: The Court holds -- I stipulate to
13 that. It's a foregone conclusion you've got a copy of
14 your tax return.

15 MR. NIELDS: Then there's no testimony involved
16 at all, so we don't even get to the question of
17 incrimination.

18 QUESTION: Well, but that -- that just didn't
19 fit your -- your nice summary that you gave, it seemed to
20 me. He is being convicted because he truthfully complied
21 with a subpoena and they wouldn't have had the information
22 otherwise. So, then your -- your test doesn't quite work.

23 MR. NIELDS: It -- I believe it does, but it
24 needs a little more explanation. The Court in Fisher says
25 that the key question is are you relying on the witness'

1 truth-telling to get the document, and Fisher says if it's
2 a foregone conclusion that he has it -- in Fisher, the --
3 the parties had admitted that they had it -- if it's a
4 foregone conclusion, then you're not relying on the
5 witness' truth-telling.

6 QUESTION: All right, but in any case where it's
7 not a foregone conclusion, that this particular document
8 -- I mean, why stop there? That the words on this
9 particular document are precisely what they are. In any
10 case where it isn't a foregone conclusion -- i.e., where
11 the prosecutor doesn't already know -- on the line that is
12 being taken with this word existence, it becomes
13 testimonial and the -- the Fifth Amendment privilege
14 applies.

15 MR. NIELDS: Correct.

16 QUESTION: All right. Well, then we're back
17 overruling Fisher --

18 QUESTION: Yes.

19 QUESTION: -- back to Boyd, and not only Boyd,
20 well beyond Boyd because exactly -- as Justice Scalia
21 pointed out, it's exactly the same thing whether it's a
22 document or not. It's exactly the same thing with any
23 piece of evidence whatsoever. The only time that you
24 would be able to compel a person to produce that evidence
25 in court is when it is a foregone conclusion that he

1 already has precisely that thing.

2 MR. NIELDS: Yes.

3 QUESTION: That's very far-reaching and -- and
4 seems -- is there a -- I mean, suppose the Court decides
5 we're not going to overrule Fisher. I agree that the
6 logic of it is right in that word existence in Fisher, but
7 you can't sort of assume Fisher intends to blow itself up.

8 MR. NIELDS: Well, Fisher -- Fisher is I believe
9 quite clear, that the -- the relevant language in Fisher
10 is -- is the language that says that the existence and
11 possession of the documents are a foregone conclusion.

12 QUESTION: Yes, that's right.

13 MR. NIELDS: And therefore -- but it's the
14 therefore -- we're not relying --

15 QUESTION: Good, but we're on exactly the same
16 track. Okay. And what I'm searching for and have been
17 unable to find -- we're absolutely eye to eye as far as
18 the logic is concerned. And I'm searching. Is there some
19 kind of test in respect to existence that isn't as weak as
20 the possible -- reasonable possibility test which may be a
21 rule 17 or Fourth Amendment test under the Fourth
22 Amendment or something like that, but isn't as strong as
23 foregone conclusion and gives some meaning to these cases?
24 That's what she's -- that's what they're driving at by
25 reasonable particularity.

1 MR. NIELDS: Yes.

2 QUESTION: But -- but that's a sort of illogical
3 compromise. I mean, what do we do?

4 MR. NIELDS: I think what you do is -- I would
5 do two things. One, the principle is whether you're
6 relying on the truth-telling of the witness to find out
7 that the document exists. That's the principle. Are you
8 relying on the truth-telling of the -- that's testimony.
9 That's Fifth Amendment language: testimony, truth-
10 telling. That's the issue. And if you are, if you're
11 compelling a person to tell the truth with the consequence
12 that he loses his liberty, you have a Fifth Amendment
13 problem.

14 QUESTION: Well, why do you emphasize truth-
15 telling, Mr. Nields? I mean, a witness can speak falsely
16 and still comply with the subpoena, and the -- the remedy
17 is perjury not some immunity.

18 MR. NIELDS: The -- the reason I emphasize
19 truth-telling, Your Honor, is that the Court has done so
20 in Doe II. It specifically talks about the question of
21 whether you are relying on the witness' truth-telling to
22 -- to gain the evidence you seek. And if the answer is
23 no, the Fifth Amendment doesn't apply; if the answer is
24 yes, it does.

25 It's also in Pennsylvania against Muniz. Both

1 majority and dissent said the Fifth Amendment applies if
2 the witness is confronted with the options of truth,
3 falsity, or silence. And --

4 QUESTION: Well, that's the cruel trilemma,
5 which I think we've paid little attention to in the last
6 few years.

7 MR. NIELDS: It was absolutely adopted as the
8 standard in Pennsylvania against Muniz. And, indeed, I
9 believe the dissent also referred to the truth-falsity-
10 silence predicament.

11 And our fundamental position under the Fifth
12 Amendment is this, that where the Government puts a person
13 to two choices -- one, tell the truth and risk losing your
14 liberty; and two, commit the crime of falsification and
15 maybe go free -- the Fifth Amendment applies and extends
16 to privilege of silence.

17 QUESTION: What -- what was the document
18 involved in this case that's the least ordinary sort of
19 document? Was there a diary or something like that or?

20 MR. NIELDS: I'm not sure I could pick out the
21 least one, Your Honor.

22 QUESTION: The -- the subpoena --

23 MR. NIELDS: There was an enormous --

24 QUESTION: -- is -- is enormous.

25 MR. NIELDS: -- quantity. There were retainer

1 agreements. They weren't regular. For some clients there
2 were some, for some there weren't. There were documents
3 reflecting the receipt of fees. They were also not
4 regular, but -- but there were a -- a number of those.
5 There was work product. The Government was trying to find
6 out whether he did work for various clients, so they
7 wanted to know if there was work product.

8 QUESTION: Well, supposing this is an -- perhaps
9 it wasn't -- an ordinary income tax fraud prosecution. I
10 mean, are -- are you saying that the Government cannot
11 subpoena tax returns and accounting returns and check
12 records from -- from someone who it suspects of committing
13 fraud?

14 MR. NIELDS: It absolutely can serve the
15 subpoena, but if the witness claims the Fifth Amendment
16 privilege, and -- and he is -- he is compelled to disclose
17 the existence under immunity --

18 QUESTION: Then -- then Fisher becomes almost
19 meaningless. I -- I had thought that Fisher was a -- a
20 very significant repudiation of Boyd. It says that these
21 documents are not incriminating. But by your test you
22 simply come around by another door and achieve the same
23 result as Boyd.

24 MR. NIELDS: I think the answer is no, Your
25 Honor, and this is the reason. I agree Fisher is a very

1 significant case. And what it does, by holding that the
2 contents of the documents are not privileged, is it means
3 that the Government can get them from a variety of other
4 sources, and the owner and the person who's writing is on
5 the document has no objection. And that's what the
6 Government usually does. In a small business --

7 QUESTION: Well, when you're -- you're saying
8 contents, you mean the information contained, in other
9 words, the information does not become immunized.

10 MR. NIELDS: Correct.

11 QUESTION: Okay.

12 MR. NIELDS: Correct, so that the Government --
13 this is what they usually do. They'll -- they'll go to a
14 small business and they'll give a subpoena to a bookkeeper
15 or a secretary or a -- a document custodian or -- or they
16 will go to the other -- if it's a -- if it's a
17 communication, they go to the other party to the
18 communication and get the letter. If it's a financial
19 transaction, they go to a bank. They get it from there.
20 If it's another financial transaction, they go to a credit
21 card company.

22 QUESTION: But the fact that the information is
23 in the document subpoenaed, that remains subject to
24 privilege.

25 MR. NIELDS: No.

1 QUESTION: No. You can use the information when
2 you get it from all of these other sources.

3 MR. NIELDS: Yes.

4 QUESTION: But you can't use the information as
5 a result of its being contained in the subpoenaed document
6 subject to the immunity grant.

7 MR. NIELDS: Yes, but I would put it a slightly
8 different way. You can't compel over an immunity claim.
9 You can't compel the subject of the investigation to tell
10 you what documents exist and what documents --

11 QUESTION: Yes, I -- I understand.

12 QUESTION: You couldn't require a handwriting
13 example, I guess, could you?

14 MR. NIELDS: You can command a handwriting
15 example because this Court has said so.

16 QUESTION: Well, but I mean -- no. But you're
17 pushing the logic of it.

18 (Laughter.)

19 QUESTION: I mean, really your truth-telling
20 test is simply the obverse side of the foregone conclusion
21 coin.

22 MR. NIELDS: Yes.

23 QUESTION: I mean, they're both the same.

24 MR. NIELDS: Yes.

25 QUESTION: And -- and so, is there any fall-

1 back position? That is to say, you -- you pushed the
2 logic for what it's worth. I -- I see that. And is there
3 any position that would reconcile these cases? Like I'm
4 almost tempted to say you couldn't force people into
5 lineups on that.

6 MR. NIELDS: Well, but --

7 QUESTION: Maybe you -- maybe you could force
8 them into lineups.

9 MR. NIELDS: Yes, let me address that. I think
10 it's important.

11 QUESTION: Lineups might be -- yes.

12 MR. NIELDS: Let me talk about that whole line
13 of cases, and of course, we know Schmerber is the
14 beginning of it.

15 The point about Schmerber is that the witness
16 there could be the biggest liar or the biggest truth-
17 teller in the world, and the Government will get the same
18 blood. It is not relying on the truth-telling of the
19 person at all.

20 QUESTION: How about a voice exemplar? Give me
21 all of the money. This is a robbery. And then he can't
22 disguise his voice.

23 MR. NIELDS: That's the assumption I believe.
24 It's not stated, but the assumption is they can't disguise
25 their voice. And therefore, a voice -- a voice exemplar

1 works regardless of the truth-telling of -- of the
2 witness.

3 QUESTION: And handwriting --

4 MR. NIELDS: And handwriting. That's the
5 hardest case in this line in -- in my opinion, but -- and
6 the Court doesn't explain the handwriting decision. It -
7 - it states in one -- in one sentence, a mere handwriting
8 exemplar, in contrast to the content of what is written,
9 like the voice or the body itself, is an identifying
10 physical characteristic.

11 QUESTION: But if the handwriting can be
12 disguised, then the handwriting example would not be in
13 the Schmerber line and it would be in the document --

14 MR. NIELDS: It's the hardest case. However, I
15 believe most handwriting experts will tell you they think
16 they can -- they think they can identify even an attempted
17 disguise, that there's --

18 QUESTION: Well, what about business records,
19 Mr. Nields?

20 MR. NIELDS: Yes.

21 QUESTION: Everyone knows that a business or a
22 law firm keeps records. It keeps records of who the
23 clients are and what the billings were and what was paid.
24 It's a foregone conclusion that they do. Can the
25 Government subpoena those business records and fall within

1 the bounds of Fisher?

2 MR. NIELDS: I think the answer is no, and I'd
3 like to give two reasons. The simple, easy one I think is
4 that Doe I held no.

5 And reason number two is the one that Justice
6 Breyer proffered which is you may know that a person has
7 records, but let's just assume there is one out-of-place,
8 smoking gun document in there. The Government will only
9 get it if the witness tells the truth and produces not
10 only all the others, but that one too.

11 And, you know, we -- we civil litigators run up
12 against this all the time. Responding to a subpoena is a
13 truth-telling process, as Wigmore said. It relies on the
14 witness' moral obligation to tell the truth. When we have
15 a big civil document demand, you -- you get all these
16 documents from the company and you have to hold the specs
17 of the subpoena up against the documents and you have to
18 answer the question for every document, and it's a
19 true/false question. Is this document called for by this
20 subpoena? That's truth-telling. In a civil context --

21 QUESTION: Well, but in the context of a law
22 firm's records of clients and billings and payments, I
23 don't -- I don't see that that necessarily follows.

24 MR. NIELDS: Well, in a law firm, first of all,
25 the Fifth Amendment privilege doesn't apply at all.

1 That's Bellis I believe.

2 And -- and second, in any large business of any
3 size at all, whether it's incorporated, unincorporated,
4 partner, it is almost 100 percent of the time going to be
5 easy for the Government to -- to find a document
6 custodian, someone who has access to the documents who
7 deals with them on a regularized basis from whom they can
8 be subpoenaed. It's --

9 QUESTION: So, you're saying the Government
10 should have called in some file clerks from the law firm
11 and gotten them.

12 MR. NIELDS: Well, in this case they didn't have
13 that option because in this case my client's business had
14 terminated over a year earlier. It was a very -- there's
15 no real facts in the record on this, Your Honor, but it
16 was a -- essentially a one-person business. But in any
17 event, it was over. He was incarcerated at the time and
18 the Government simply had no idea whether he had any
19 records or not.

20 QUESTION: Did the Government have enough here
21 to get a search warrant?

22 MR. NIELDS: No, and they said so on the record.

23 QUESTION: Could -- could -- suppose you were to
24 say hypothetically, I see the logic, I see it's there in
25 the cases, I see it's there in the purposes of the Fifth

1 Amendment, but still, wouldn't it work a revolution in
2 what prosecutors and defense lawyers alike have come to
3 expect that the Fifth Amendment stands for? And
4 revolutions don't take place ordinarily in the law even if
5 the -- without them it's a little illogical, at least --
6 et cetera. Could you expand a little on that theme?

7 MR. NIELDS: Yes. I'd like to make two points
8 in response to that.

9 One is it wouldn't do a revolution at all. It
10 would leave things virtually exactly the way they've been
11 for the last century. There has been no time at which,
12 over a Fifth Amendment claim, unincorporated business
13 records have been routinely obtained by the Government.
14 The only time they've been obtained -- and they've
15 virtually never been obtained under immunity. The only
16 time --

17 QUESTION: Mr. Nields, let me interrupt. You're
18 saying then that Fisher really didn't amount to much of
19 anything in overruling Boyd if the thing has been the same
20 for the last century.

21 MR. NIELDS: Fisher made a -- a very important
22 clarification that so-called private documents,
23 unincorporated -- documents of an unincorporated entity,
24 documents which might have the subject's writing on them
25 -- Fisher made it very clear that those documents were

1 obtainable in any one of a variety of ways not involved
2 compelling self-incrimination, including a search warrant.

3 And Andresen was a -- a decision this Court
4 handed down the same term as Fisher which relied on Fisher
5 that said a search warrant can be issued for a person's
6 documents even though they may have private writings on
7 them.

8 So, Fisher was an important case, but if the
9 question is, has the Justice Department or -- or anyone
10 been routinely subpoenaing from the subject business
11 records, the answer is no.

12 QUESTION: Well, that's -- I took Justice
13 Breyer's question as -- as being susceptible of that
14 answer as well, that the revolution is -- is if we sustain
15 a subpoena of -- of this breadth. But the question is
16 what's the rationale we have for drawing the line between
17 something that's very specific and something that's this
18 broad? I -- I'm not sure what the rationale is.

19 MR. NIELDS: Well, the rationale again gets back
20 to -- you asked the question are you relying on the
21 witness' truth-telling to get the evidence that you seek,
22 and if the answer is yes, then the Fifth Amendment
23 applies.

24 QUESTION: I see that. Now, apply that to
25 outside the business record context, and is there a

1 revolution there? I mean, after all, the same principle
2 will apply whether it's a business record or any other
3 kind of evidence that the -- the person asserting the
4 amendment has in his possession.

5 MR. NIELDS: I mean, pardon me for saying so,
6 but I think that prosecutors all over the country would
7 fall down dead if they thought they could subpoena guns or
8 -- or incriminating bloody underwear or -- or --

9 QUESTION: Booty from hijacking or something.

10 MR. NIELDS: Yes. I mean, it just -- it's
11 completely unthinkable.

12 And I would say this, too, while we're on the
13 law enforcement topic. One of the things -- not only is
14 this immunity that they have issued here, according to
15 their understanding of it -- not only is it ineffective
16 from my client's point of view, ineffective to meet the
17 constitutional requirements, but it's ineffective from
18 their point of view. It's -- it's ineffective for law
19 enforcement purposes. The wonderful thing about immunity
20 for -- for law enforcement is that it removes the witness'
21 incentive to lie because it holds him harmless. It
22 promises him he won't be prosecuted because of anything
23 that turns up.

24 QUESTION: Well, but -- but in -- in the first
25 Doe case, it was business records, and the Court said,

1 fine, you can compel those and use the contents against
2 the producer.

3 MR. NIELDS: I don't think so. I think in the
4 first Doe case the Court held that the act of production
5 is privileged, and the Government, therefore, didn't get
6 the documents.

7 QUESTION: But it went on to say the contents of
8 voluntarily prepared private papers enjoy no privilege.

9 MR. NIELDS: Yes, and -- and that was also said
10 in Fisher, and it's a very important and very true thing.
11 But it doesn't answer the question of -- of what do you do
12 if the testimony you do compel leads you to documents.

13 And -- and in the example analogous to a gun
14 where the -- the crucial document is some smoking gun
15 document, is possessed by the witness, if the witness is
16 asked orally in the grand jury, is there such a document,
17 where is it located, and the Government goes and gets it,
18 the document isn't privileged, but it's absolutely tainted
19 and couldn't possibly be used.

20 But getting back to the point I was making
21 before, this kind of immunity says to a witness, witness,
22 you are obligated to turn over all your documents and if
23 there are incriminating ones in them, I will use them to
24 indict you. That is a terrible kind of immunity. It's
25 not only ineffective for the Fifth Amendment, but it's

1 ineffective law enforcement, that you want to be able to
2 tell the witness, now that you're under immunity, you
3 should give me all your documents because the only way you
4 can get into trouble is -- is to respond falsely.

5 QUESTION: Well, you can do that. I mean, if
6 they want to give him that immunity, they will.

7 MR. NIELDS: Well, they can do it but not from
8 State prosecutors I believe.

9 QUESTION: You're saying it does convert law
10 enforcement into an essentially inquisitorial system --

11 MR. NIELDS: It does that too.

12 QUESTION: -- if you can do that.

13 Would you explain the foregone conclusion
14 doctrine to me? And the reason I -- I ask is this, to
15 focus the question. Even in the case in which it is a
16 foregone conclusion that some document exists, when the
17 Government subpoenas it and the subject of the subpoena
18 hands it over, there at least is implicit testimony there
19 that the -- the witness agrees the document exists. But
20 -- but more precisely, it -- there's always implicit
21 testimony that the witness has the document under his
22 control and -- and that's why he's able to -- to hand it
23 over. So that even in the case of the foregone
24 conclusion, there is some testimonial aspect, and I
25 suppose it's a testimonial aspect to which the -- the

1 later use of the -- of the document can -- can be traced.
2 And yet, under the foregone conclusion doctrine, we say,
3 well, it can be used anyway.

4 The reason I guess is not that there is no
5 conceivable use of testimony, but that because of the
6 foregone conclusion, it's understood that the Government
7 could get it anyway by a different means, e.g., a Fourth
8 Amendment search warrant. Am I right that it's kind a --
9 a harmlessness analysis?

10 MR. NIELDS: I think it has a harmlessness
11 element to it. And I understand Your Honor's point that
12 there is, of course, nonetheless, some implicit testimony.
13 But I think the point of it is that the Government isn't
14 relying upon the witness' truth-telling.

15 QUESTION: Well, then in -- in the gun case, you
16 really think the gun case comes out differently if, you
17 know, the -- the suspected murderer has shown the gun to
18 somebody and then he runs off to a cabin in the woods? He
19 has been surrounded ever since there -- then. You know
20 that the gun exists. You know that he has it somewhere in
21 the cabin in the woods. He could have buried it
22 somewhere. Search and seizure. You're never going to dig
23 it up. In that case, since it's a foregone conclusion,
24 you can require him to turn over the gun?

25 MR. NIELDS: I'm not sure, Your Honor.

1 QUESTION: It seems very strange to me.

2 QUESTION: Why not? Why not?

3 MR. NIELDS: It does seem strange.

4 QUESTION: Sorry. Just in answering it, why
5 not?

6 MR. NIELDS: Well, the -- the only case in this
7 Court in which the foregone conclusion doctrine has been
8 applied is one in which the parties conceded the existence
9 and location of the documents and argued only about their
10 contents. The -- the -- in Doe, the Court said existence
11 and location was not conceded, and they held the Fifth
12 Amendment applied. In this case my client went in front
13 of the grand jury and expressly stated I decline to say
14 whether or not there are any documents responsive --

15 QUESTION: So, you have some doubts about the
16 foregone conclusion qualification.

17 MR. NIELDS: It may only --

18 QUESTION: It may be an admission qualification
19 rather than --

20 MR. NIELDS: It might but I would suggest this.
21 This is not a very good case to try to figure out exactly
22 and announce exactly what the rule is, exactly where you
23 draw the line. Fisher said these cases should be decided
24 on their own facts. And here we have no facts. The
25 Government did not even argue foregone conclusion in the

1 lower court. There's no factual record about what they
2 knew, and there won't ever be one because, as the Court
3 knows, the case is essentially over.

4 QUESTION: But had there not been that
5 stipulation, I take it the court of appeals left it
6 subject to a -- a remand to get into that very issue.

7 MR. NIELDS: Get into that. And they -- they
8 adopted a test which had previously been adopted by the
9 Second Circuit, which is the Government had to know the
10 documents' existence and possession with reasonable
11 particularity. That is a test that two courts of appeals
12 have adopted. It strikes me as a more relaxed test than
13 foregone conclusion which is a pretty extreme sounding
14 phrase.

15 QUESTION: It sounds more like the Fourth
16 Amendment.

17 MR. NIELDS: It does sound more like Fourth
18 Amendment.

19 But what I would suggest here is that -- that
20 this isn't the case to lay down the exact standard, only
21 to say that the analysis has to be are you relying on the
22 witness' truth-telling to get the document. And if you
23 are, it's testimony and the Fifth Amendment applies. And
24 if you only got an incriminating document because the
25 witness told the truth and you got it under immunity, you

1 got to hold the witness harmless. You have to leave him
2 -- as Kastigar said, as emphatically as Kastigar could
3 say, you must leave him after immunity in just as good a
4 position as he would have been if he had been left to his
5 Fifth Amendment privilege. And under Doe, Mr. Hubbell had
6 a Fifth Amendment privilege not to tell whether he had any
7 of these documents.

8 QUESTION: Well, you would -- you would -- I
9 guess it would be sufficient for you if we said if the
10 Government is relying, then the Government has a -- if it
11 still claims that it can use, it has a burden to come
12 forward and show something. And maybe it would be enough
13 for the Government to say, in fact, it's not relying that
14 -- to -- to rebut that conclusion. But it might also be
15 enough if the Government came forward -- and this was the
16 suggestion I was making -- and said we don't have to rely
17 because we could have gotten it by Fourth Amendment means.

18 MR. NIELDS: Yes.

19 QUESTION: But we don't -- we don't choose
20 between those possibilities.

21 MR. NIELDS: That's correct. The problem with
22 the second one here is that the Government -- I expected,
23 frankly, in the district court that we would get an
24 inevitable discovery position or legitimate independent
25 source position, but they didn't proffer either. They

1 simply conceded that they had used the information
2 compelled under immunity to bring this indictment.

3 QUESTION: Thank you, Mr. Nields.

4 MR. NIELDS: Thank you, Your Honor.

5 CHIEF JUSTICE REHNQUIST: The case is submitted.

6 (Whereupon, at 11:12 a.m., the case in the
7 above-entitled matter was submitted.)

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CERTIFICATION

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UNITED STATES, Petitioner v. WEBSTER L. HUBBELL.
CASE NO: 99-166

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BY: Dona M. May
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