# SUPREME COURT OF THE UNITED STATES

No. 99–166

UNITED STATES, PETITIONER *v.* WEBSTER L. HUBBELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 5, 2000]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring.

Our decision today involves the application of the act-of-production doctrine, which provides that persons compelled to turn over incriminating papers or other physical evidence pursuant to a subpoena *duces tecum* or a summons may invoke the Fifth Amendment privilege against self-incrimination as a bar to production only where the act of producing the evidence would contain "testimonial" features. See *ante*, at 6–10. I join the opinion of the Court because it properly applies this doctrine, but I write separately to note that this doctrine may be inconsistent with the original meaning of the Fifth Amendment's Self-Incrimination Clause. A substantial body of evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of any incriminating evidence. In a future case, I would be willing to reconsider the scope and meaning of the Self-Incrimination Clause.

## I

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The key word at issue in this case is "witness." The Court's opinion, relying on prior cases,

essentially defines "witness" as a person who provides testimony, and thus restricts the Fifth Amendment's ban to only those communications "that are 'testimonial' in character." *Ante*, at 6. None of this Court's cases, however, has undertaken an analysis of the meaning of the term at the time of the founding. A review of that period reveals substantial support for the view that the term "witness" meant a person who gives or furnishes evidence, a broader meaning than that which our case law currently ascribes to the term. If this is so, a person who responds to a subpoena *duces tecum* would be just as much a "witness" as a person who responds to a subpoena *ad testificandum*.[1]

Dictionaries published around the time of the founding included definitions of the term "witness" as a person who gives or furnishes evidence. Legal dictionaries of that period defined "witness" as someone who "gives evidence in a cause." 2 G. Jacob, A New Law-Dictionary (8th ed. 1762); 2 T. Cunningham, New and Complete Law-Dictionary (2d ed. 1771); T. Potts, A Compendious Law Dictionary 612 (1803); 6 G. Jacob, The Law-Dictionary 450 (T. Tomlins 1st American ed. 1811). And a general dictionary published earlier in the century similarly defined "witness" as "a giver of evidence." J. Kersey, A New English Dictionary (1702). The term "witness" apparently continued to have this meaning at least until the first edition of Noah Webster's dictionary, which defined it as "[t]hat which furnishes evidence or proof." An American

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[1] Even if the term "witness" in the Fifth Amendment referred to someone who provides testimony, as this Court's recent cases suggest without historical analysis, it may well be that at the time of the founding a person who turned over documents would be described as providing testimony. See *Amey* v. *Long*, 9 East. 472, 484, 103 Eng. Rep. 653, 658 (K.B. 1808) (referring to documents requested by subpoenas *duces tecum* as "written . . . testimony").

Dictionary of the English Language (1828). See also J. Story, Commentaries on the Constitution of the United States §931 (1833) (using phrases "to give evidence" and "to furnish evidence" in explanation of the Self-Incrimination Clause). See generally Nagareda, Compulsion "to be a witness" and the Resurrection of *Boyd*, 74 N. Y.U. L. Rev. 1575, 1608–1609 (1999).[2]

Such a meaning of "witness" is consistent with, and may help explain, the history and framing of the Fifth Amendment. The 18th century common-law privilege against self-incrimination protected against the compelled production of incriminating physical evidence such as papers and documents. See Morgan, The Privilege against Self-Incrimination, 34 Minn. L. Rev. 1, 34 (1949); Nagareda, *supra*, at 1618–1623. Several 18th century cases explicitly recognized such a self-incrimination privilege. See *Roe* v. *Harvey*, 4 Burr. 2484, 2489, 98 Eng. Rep. 302, 305 (K. B. 1769); *King* v. *Purnell*, 1 Black. 37, 42, 96 Eng. Rep. 20, 23 (K. B. 1748); *King* v. *Cornelius*, 2 Str. 1210, 1211, 93 Eng. Rep. 1133, 1134 (K. B. 1744); *Queen* v. *Mead*, 2 LD. Raym. 927, 92 Eng. Rep. 119 (K. B. 1703); *King* v. *Worsenham*, 1 LD. Raym. 705, 91 Eng. Rep. 1370 (K. B. 1701). And this Court has noted that, for generations before the framing,

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[2] Further, it appears that the phrases "gives evidence" and "furnishes evidence" were not simply descriptions of the act of providing testimony. For example, in *King* v. *Purnell*, 1 Black. 37, 96 Eng. Rep. 20 (K. B. 1748), the phrase "furnish evidence" is repeatedly used to refer to the compelled production of books, records, and archives in response to a government request. *Id*., at 40, 41, 42, 96 Eng. Rep., at 21, 22, 23. See also, *e.g.*, *King* v. *Cornelius*, 2 Str. 1210, 1211, 93 Eng. Rep. 1133, 1134 (K. B. 1744) (compelling discovery of books "is in effect obliging a defendant . . . to furnish evidence against himself"); 1 T. Cunningham, New and Complete Law-Dictionary (2d ed. 1771) (evidence "signifies generally all proof, be it testimony of men, records or writings"); 1 G. Jacob, The Law-Dictionary (T. Tomlins ed. 1797) (defining "evidence" as "[p]roof by testimony of witnesses, on oath; or by writings or records").

"one cardinal rule of the court of chancery [wa]s never to decree a discovery which might tend to convict the party of a crime." *Boyd* v. *United States*, 116 U. S. 616, 631 (1886). See also *Counselman* v. *Hitchcock*, 142 U. S. 547, 563–564 (1892) ("It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures").

Against this common-law backdrop, the privilege against self-incrimination was enshrined in the Virginia Declaration of Rights in 1776. See Moglen, The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege against Self-Incrimination: Its Origins and Development 133–134 (R. Helmholz, et al., eds. 1997). That document provided that no one may "be compelled to give evidence against himself." Virginia Declaration of Rights §8 (1776), in 1 The Bill of Rights: A Documentary History 235 (B. Schwartz ed. 1971). Following Virginia's lead, seven of the other original States included specific provisions in their Constitutions granting a right against compulsion "to give evidence" or "to furnish evidence." See Pennsylvania Declaration of Rights, Art. IX (1776) ("give"), *id.*, at 265; Delaware Declaration of Rights §15 (1776) ("give"), *id.*, at 278; Maryland Declaration of Rights Art. XX (1776) ("give"), *id.*, at 282; North Carolina Declaration of Rights, Art. VII (1776) ("give"), *id.*, at 287; Vermont Declaration of Rights, Ch. I, Art. X (1777) ("give"), *id.*, at 323; Massachusetts Declaration of Rights, Pt. 1, Art. XII (1780) ("furnish"), *id.*, at 342; New Hampshire Bill of Rights Art. XV (1783) ("furnish"), *id.*, at 377. And during ratification of the Federal Constitution, the four States that proposed bills of rights put forward draft proposals employing similar wording for a federal constitutional provision guaranteeing the right against compelled self-incrimination. Each of the proposals broadly sought to protect a citizen from "be[ing] com-

pelled to give evidence against himself." Virginia Proposal (June 27, 1788), 2 *id.*, at 841; New York Proposed Amendments (July 26, 1788), *id.*, at 913; North Carolina Proposed Declaration of Rights (Aug. 1, 1788), *id.*, at 967; Rhode Island Proposal (May 29, 1790) (same suggestion made following the drafting of the Fifth Amendment), in N. Cogan, The Complete Bill of Rights 327 (1997). See also, *e.g.*, The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents (Dec. 13, 1787) (same suggestion), in 2 Schwartz, *supra*, at 665; 2 Debates on the Federal Constitution 111 (J. Elliot 2d ed., 1854) (Mr. Holmes, Mass., Jan. 30, 1788) (objecting that nothing prohibits compelling a person "to furnish evidence against himself"). Similarly worded proposals to protect against compelling a person "to furnish evidence" against himself came from prominent voices outside the conventions. See The Federal Farmer No. 6 (1787), in Cogan, *supra*, at 333; Letter of Brutus, No. 2 (1788), in 1 Schwartz, *supra*, at 508.

In response to such calls, James Madison penned the Fifth Amendment. In so doing, Madison substituted the phrase "to be a witness" for the proposed language "to give evidence" and "to furnish evidence." But it seems likely that Madison's phrasing was synonymous with that of the proposals. The definitions of the word "witness" and the background history of the privilege against self-incrimination, both discussed above, support this view. And this may explain why Madison's unique phrasing— phrasing that none of the proposals had suggested— apparently attracted no attention, much less opposition, in Congress, the state legislatures that ratified the Bill of Rights, or anywhere else. See 2 W. LaFave, J. Israel, & N King, Criminal Procedure 290–291 (2d ed. 1999). In fact, the only Member of the First Congress to address self-incrimination during the debates on the Bill of Rights treated the phrases as synonymous, restating Madison's

formulation as a ban on forcing one "to give evidence against himself." 1 Annals of Cong. 753–754 (J. Gales ed. 1834) (statement of Rep. Laurance).[3]

In addition, a broad definition of the term "witness"— one who gives evidence— is consistent with the same term (albeit in plural form) in the Sixth Amendment's Compulsory Process Clause.[4] That Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his

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[3]Representative Laurance was no stranger to the Self-Incrimination Clause; he was responsible for the limiting phrase "in any criminal case," which was added to the Clause without any recorded opposition. See L. Levy, Origins of the Fifth Amendment, The Right Against Self-Incrimination 424–427 (1968). In support of this suggestion, Laurance noted that, absent such a restriction, the Fifth Amendment was "a general declaration, in some degree contrary to laws passed." 1 Annals of Cong. 753 (J. Gales ed. 1834). Two prominent commentators have suggested that "laws passed" likely refers to §15 of the Judiciary Act of 1789 (then in the process of passage). See Levy, *supra*, at 425–426; Moglen, The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege against Self-Incrimination: Its Origins and Development 258, n. 109 (R. Helmholz, et al., eds. 1997). Section 15 provided that federal courts "shall have power in the trial of actions at law . . . to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." Judiciary Act of 1789, 1 Stat. 82. Section 15's grant of power to compel discovery in civil cases would have been inconsistent with an unrestricted Self-Incrimination Clause, but only if the term "witness" in that Clause included persons who provide such physical evidence as "books" and "writings." Laurance's assertion thus suggests that the Framers believed the Self-Incrimination Clause offered protection against such compelled production.

[4]A broad view of the term "witness" in the compulsory process context dates back at least to the beginning of the 18th century. See Act of May 31, 1718, ch. 236, §4, 1 Laws of Pennsylvania 112 (J. Bioren ed. 1810) (speaking of witnesses "be[ing] admitted to [be] depose[d], *or* give any manner of evidence" (emphasis added)).

favor." Soon after the adoption of the Bill of Rights, Chief Justice Marshall had occasion to interpret the Compulsory Process Clause while presiding over the treason trial of Aaron Burr. *United States* v. *Burr*, 25 F. Cas. 30 (No. 14,692d) (CCD Va. 1807). Burr moved for the issuance of a subpoena *duces tecum* to obtain from President Jefferson a letter that was said to incriminate Burr. The Government objected, arguing that compulsory process under the Sixth Amendment permits a defendant to secure a subpoena *ad testificandum*, but not a subpoena *duces tecum*. *Id.*, at 34. The Chief Justice dismissed the argument, holding that the right to compulsory process includes the right to secure papers– in addition to testimony– material to the defense. *Id.*, at 34–35. This Court has subsequently expressed agreement with this view of the Sixth Amendment. See *United States* v. *Nixon*, 418 U. S. 683, 711 (1974). Although none of our opinions has focused upon the precise language or history of the Compulsory Process Clause, a narrow definition of the term "witness" as a person who testifies seems incompatible with *Burr*'s holding. And if the term "witnesses" in the Compulsory Process Clause has an encompassing meaning, this provides reason to believe that the term "witness" in the Self-Incrimination Clause has the same broad meaning. Yet this Court's recent Fifth Amendment act-of-production cases implicitly rest upon an assumption that this term has different meanings in adjoining provisions of the Bill of Rights.[5]

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[5] Accepting the definition of "witness" as one who gives or furnishes evidence would also be compatible with my previous call for a reconsideration of the phrase "witnesses against him" in the Confrontation Clause of the Sixth Amendment. See *White* v. *Illinois*, 502 U. S. 346, 365 (1992) (opinion concurring in part and concurring in judgment).

II

This Court has not always taken the approach to the Fifth Amendment that we follow today. The first case interpreting the Self-Incrimination Clause— *Boyd* v. *United States*— was decided, though not explicitly, in accordance with the understanding that "witness" means one who gives evidence. In *Boyd*, this Court unanimously held that the Fifth Amendment protects a defendant against compelled production of books and papers. 116 U. S. 616, 634–635 (1886); *id.*, at 638–639 (Miller, J., concurring in judgment). And the Court linked its interpretation of the Fifth Amendment to the common-law understanding of the self-incrimination privilege. *Id.*, at 631–632.

But this Court's decision in *Fisher* v. *United States*, 425 U. S. 391 (1976), rejected this understanding, permitting the Government to force a person to furnish incriminating physical evidence and protecting only the "testimonial" aspects of that transfer. *Id.*, at 408. In so doing, *Fisher* not only failed to examine the historical backdrop to the Fifth Amendment, it also required— as illustrated by extended discussion in the opinions below in this case— a difficult parsing of the act of responding to a subpoena *duces tecum*.

None of the parties in this case has asked us to depart from *Fisher*, but in light of the historical evidence that the Self-Incrimination Clause may have a broader reach than *Fisher* holds, I remain open to a reconsideration of that decision and its progeny in a proper case.[6]

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[6] To hold that the Government may not compel a person to produce incriminating evidence (absent an appropriate grant of immunity) does not necessarily answer the question whether (and, if so, when) the Government may secure that same evidence through a search or seizure. The lawfulness of such actions, however, would be measured by the Fourth Amendment rather than the Fifth.