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# SUBPOENAS AND PRIVACY

*Christopher Slobogin\**

## INTRODUCTION

In its efforts to enforce the law and investigate crime, the government routinely seeks access to records and other documents. The primary mechanism for acquiring these materials is the subpoena, a formal demand for tangible items. No nationwide tally of the extent to which law enforcement uses document subpoenas exists. But the federal government alone issues thousands of such subpoenas every year.<sup>1</sup> Thus, as an investigative tool, subpoenas are probably more important than physical searches of homes, businesses, and effects. Yet very little literature on the history or rationale of the subpoena exists. This Article seeks to help fill that void.

There are two types of investigative document subpoenas. Subpoenas *duces tecum* are controlled by the grand jury or the prosecutor, with the courts determining their validity when they are resisted by the target.<sup>2</sup> Administrative subpoenas or summons are issued by government agencies, such as the Internal Revenue Service, the Federal Trade Commission, and the Department of Justice, and are also enforced by the courts.<sup>3</sup>

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1. See *infra* notes 175–185 and accompanying text. See also Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 30 (1986) (stating that “subpoenas and summonses for documents have become a staple of investigations regarding every variety of sophisticated criminal activity, from violations of regulatory provisions to political corruption and large-scale drug dealing”).

2. Although as a formal matter, the grand jury normally issues the subpoena, in only a small number of states does the grand jury actually control the subpoena power; in most it is exercised by the prosecutor. SARA SUN BEALE ET AL., 1 GRAND JURY LAW AND PRACTICE § 6:2 (2d ed. 2004).

3. See generally JACOB A. STEIN ET AL., 3 ADMINISTRATIVE LAW § 20.04 (2002) (describing administrative agencies’ “extensive power to take testimony under oath, inspect records and documents, and require the submission of reports” (quoting *Donovan v. Shaw*, 668 F.2d 985 (8th Cir. 1982))).

Although both types of subpoenas can be challenged by the recipient before any documents are handed over,<sup>4</sup> both are also extremely easy to enforce. There are essentially three grounds for resisting a subpoena: privilege, burdensomeness, and irrelevance. A successful privilege claim is rare; as explained in some detail in this Article, the Fifth Amendment privilege against self-incrimination is usually unavailable and the attorney-client privilege is coextensive with that privilege. Objections that the task of assembling the records demanded by a subpoena is too burdensome or expensive also “are almost always doomed to failure.”<sup>5</sup> And an irrelevance challenge is usually equally unavailing. In the federal grand jury context, for instance, subpoenas are quashed as irrelevant only when “there is no reasonable possibility that the category of materials the government seeks will produce information relevant to the general subject of the grand jury’s investigation.”<sup>6</sup> The relevancy standard in the administrative subpoena context is similarly lax. The Supreme Court has indicated that constitutional requisites are met even when a subpoena seeks to satisfy “nothing more than official curiosity,”<sup>7</sup> and some lower courts have concluded that the standard is even more deferential than the “arbitrary and capricious” test applied in administrative law cases.<sup>8</sup>

Yet, as I have detailed elsewhere,<sup>9</sup> today subpoenas and pseudo-subpoenas<sup>10</sup> are routinely used not only to obtain business records

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4. See BEALE ET AL., *supra* note 2, at 6-21 (stating that, with respect to grand juries, “the subpoenaed party has an opportunity to seek judicial review in order to raise any objections to the legality of the subpoena and to assert any privileges that may be applicable”); STEIN ET AL., *supra* note 3, at 21–24 (noting that, in federal administrative cases, motions to quash must be brought before the agency, which then must apply to federal court for enforcement).

5. WAYNE R. LAFAYE ET AL., 3 CRIMINAL PROCEDURE 135 (2d ed. 1999).

6. *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991). For a general discussion of the extremely minimal showing of materiality required for grand jury subpoenas *duces tecum*, see LAFAYE ET AL., *supra* note 5, at 134 (noting that “[c]ourts generally give grand juries considerable leeway in judging relevancy”); *id.* at 146–54 (describing Supreme Court and lower court case law suggesting that irrelevance, independent of overbreadth, is not a ground for finding a subpoena invalid under the Fourth Amendment).

7. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). See also *United States v. Powell*, 379 U.S. 48, 57–58 (1964) (requiring only that an administrative subpoena be issued for a “legitimate purpose”).

8. See *United States v. Hunton & Williams*, 952 F. Supp. 843, 854 (D.D.C. 1995). See STEIN ET AL., *supra* note 3, at 20–59 (stating that lower courts have held “that subpoenas will be enforced as to any documents that ‘are not plainly immaterial or irrelevant to the investigation’” (quoting *Donovan v. Shaw*, 668 F.2d 985 (5th Cir. 1982))).

9. Christopher Slobogin, *Transaction Surveillance by the Government*, 75 Miss. L.J. (forthcoming Fall 2005) (page number references are to an unpublished draft on file with the DePaul Law Review).

10. Certain types of transaction surveillance may be authorized via “*ex parte* subpoenas” (subpoenas that may be challenged only by the third-party recordholder, not the subject of the

and the like, but also documents containing significant amounts of personal information about individuals, information that can be extremely revealing. For instance, a subpoena is all the federal government needs to obtain medical, financial, and school records.<sup>11</sup> The contents of “stored” e-mail messages and phone company and Internet Service Provider logs can also be acquired pursuant to a subpoena.<sup>12</sup> And other types of information—ranging from the phone numbers and e-mail addresses one contacts, to the contents of records kept by government agencies—can be obtained simply upon the certification of a law enforcement official that the information will be useful to a government investigation.<sup>13</sup>

From a privacy perspective, this state of affairs is, at the least, puzzling. Under the Fourth Amendment, which is meant to protect “reasonable expectations of privacy,”<sup>14</sup> the government usually needs probable cause—akin to a more-likely-than-not standard—to search “houses, persons, papers and effects.”<sup>15</sup> Yet the government can obtain many types of “papers” containing personal, private information on a far lesser showing.

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records); “certification orders” (orders that must be issued by the court if law enforcement certifies the information sought is relevant); and “extrajudicial certifications” (letters from law enforcement officials certifying the relevance of the sought-after records). *See id.* at 32.

11. 45 C.F.R. § 164.512(f)(1)(ii) (2004) (authorizing subpoenas for medical records under the federal Health Insurance Portability and Accountability Act); 12 U.S.C. § 3409 (2000) (authorizing subpoenas for financial records from banks under the Right to Financial Privacy Act); 15 U.S.C. § 1681b(a)(1) (2000) (authorizing subpoenas for credit agency information under the Fair Credit Reporting Act); 20 U.S.C. § 1232g(b)(1)(J) (2000) (authorizing subpoenas for educational records under the Family Educational Rights and Privacy Act).

12. With respect to stored e-mail, see 18 U.S.C. §§ 2703(a), (b) (2000) (authorizing, under the Electronic Communications Privacy Act (ECPA), subpoenas for e-mail that has been sitting on a server for longer than 180 days without being opened and for e-mail that the recipient has accessed and stored on an outside server for any length of time). If the information is stored with a service not available to the general public (e.g., one run by an employer), then the ECPA does not apply and the government may obtain the stored information (content or identifying) simply upon a request. *See id.* §§ 2703(a)(1)–(3). With respect to Internet Service Provider logs, see 18 U.S.C. §§ 2703(c), (d) (authorizing access to these records if the government alleges that the records are “relevant and material to an ongoing criminal investigation”).

13. 18 U.S.C. § 3123(a)(1) (2000) (requiring courts to issue an order authorizing the use of pen registers and trap and trace devices when a federal government attorney or state law enforcement officer certifies that phone numbers or e-mail addresses are “relevant to an ongoing criminal investigation”); 5 U.S.C.A. § 552a(b)(7) (West Supp. 2004) (permitting a law enforcement agency to obtain any federal agency record upon a written request by the head of the law enforcement entity).

14. This phrase first appeared in Justice Harlan’s concurring opinion in *Katz v. United States*, 389 U.S. 347, 362 (1967), and has since become the standard definition of “search” under the Fourth Amendment. *See, e.g., California v. Ciralo*, 476 U.S. 207, 211 (1986).

15. U.S. CONST. amend. IV; *see also* LAFAYE ET AL., *supra* note 5, at 90–91.

Part I of this Article tries to explain how this state of affairs came to pass. Throughout the nineteenth century, courts looked to the Fifth Amendment, not the Fourth Amendment, in analyzing the validity of subpoenas, and most believed that the Fifth Amendment's injunction against compelling a person to testify against himself *prohibited* the government from demanding incriminating documents from a suspect. Late in the nineteenth century the Supreme Court expanded on this notion, by holding that such compulsion violated the Fifth Amendment *and* the Fourth Amendment's restriction on unreasonable searches and seizures.<sup>16</sup> At the turn of the twentieth century, however, the Court reversed itself, removing virtually all Fourth Amendment strictures on document subpoenas and, when the documents were corporate in nature, eliminating Fifth Amendment limitations as well. This dramatic shift in the Court's posture was refined during the first three quarters of the twentieth century and remains good law today.

The point emphasized in Part I, however, is that the Court's deregulation of subpoenas came in cases involving government attempts to regulate *businesses*; not a single one of them involved searches of personal papers. Because, as far as the Court was concerned, personal records held by the person him or herself—in those days, most personal records—remained protected by the Fifth Amendment's prohibition on compelled testimony, the virtual elimination of Fourth Amendment protection against subpoenas had no impact in that area.

Two relatively recent developments, also described in Part I, have changed all that. First, within the past three decades, the Supreme Court has radically altered its approach to the Fifth Amendment privilege, so that today personal records held by the target are almost as unprotected as corporate records as far as that constitutional provision is concerned. Far more importantly, the modernization of society has rendered the Fifth Amendment's application to personal records largely irrelevant in any event. That is because, in contrast to nineteenth century culture, so much more of our personal information is now recorded and held by third parties. When third parties are ordered to produce information via a subpoena, they cannot, under any plausible interpretation of the Fifth Amendment, be said to be incriminating themselves. Thus, when the government compels production from a third-party recordholder—whether the recordholder is a hos-

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16. See *Boyd v. United States*, 116 U.S. 616 (1886) (discussed *infra* text accompanying notes 32–38).

pital, an Internet Service Provider, or another government agency—it is not violating the target’s Fifth Amendment right.

Since today most subpoenas for personal documents are aimed at third-party recordholders, the upshot of these developments is that the government is almost entirely unrestricted, by either the Fifth or Fourth Amendment, in its efforts to obtain documentary evidence of crime. Part II of this Article confronts the various rationales for this paltry regulatory regime. More specifically, it identifies six possible reasons why subpoenas need not meet the probable cause standard even when aimed at obtaining personal information (the first and last of which apply to all subpoenas, and the rest of which are relevant only to third-party subpoenas). The first justification, offered over a century ago, is that subpoenas are not “searches” under the Fourth Amendment because they do not involve physical intrusion. The second, put forward by the modern Supreme Court, is that third-party subpoenas are not searches because the information they seek is already exposed to others. The next three reasons are not as clearly stated in Supreme Court opinions but are implicit in the Court’s language or are found in lower court decisions: The records obtained through third-party subpoenas belong to the third party, not the target; third-party recordholders are no different from third-party witnesses who have information about a suspect; and third parties have an obligation to provide information to the government. The final reason courts give for leaving subpoenas essentially unregulated is also the most common: Imposition of rigorous Fourth Amendment requirements on subpoenas would stultify important government investigations.

The conclusions that Part II reaches with respect to these six rationales turn on the historical distinction described in Part I. Many of the rationales for deregulating subpoenas are persuasive in the context which most commonly triggers the use of subpoenas and in which constitutional subpoena law developed—the investigation of corporate crime. But none of these rationales is convincing when applied to demands for personal records.

If these conclusions are correct, then distinguishing between impersonal and personal records is important. That is the task of Part III. Ironically, this part of the Article borrows heavily from the Court’s old Fifth Amendment jurisprudence, which justified protection of records based in large part on a desire to create a “zone of privacy.” The irony stems from the fact that today, of course, the Fifth Amendment is not about privacy at all, but rather about coercion. The fact that the Court’s early Fifth Amendment decisions were focused on

protection of privacy suggests that, had the Court of one hundred years ago known its Fifth Amendment jurisprudence would be jettisoned, its Fourth Amendment jurisprudence might have been much more protective of documentary evidence that is personal in nature.

## II. A CONSTITUTIONAL HISTORY OF SUBPOENAS

There are three legal processes for obtaining documents. The first is the search warrant, which is issued *ex parte* and must be based on a finding of probable cause.<sup>17</sup> The second is a subpoena directed at the person or entity whose activities are described in the documents (a “first-party” or “target” subpoena). The third is a subpoena directed at a person or entity who is not a target of an investigation but happens to hold records relevant to it (a “third-party” subpoena). As noted above, subpoenas are usually valid so long as the documents they demand are “relevant” to an investigation, a much lower standard than probable cause.<sup>18</sup>

Given this fact, warrants are seldom used to obtain documents. In theory, a government agency interested in records might occasionally prefer to rely on a warrant, despite the greater difficulty of obtaining it, because of its efficiency and its scope. But in practice a warrant is seldom superior to a subpoena.

The warrant’s supposed advantage over the first-party subpoena is that it is executed when it is served and thus avoids the possibility of evidence destruction. But destruction of documents after receiving a subpoena is unlikely where business records are involved, both because they are needed to run the business and because so many people know of their existence that obstruction of justice charges are a

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17. U.S. CONST. amend. IV (“no Warrants shall issue, but upon probable cause”). Well over a century ago the Supreme Court made clear that searches of paper require a warrant. In *Ex parte Jackson*, 96 U.S. 727 (1877), the Supreme Court stated:

Letters, and sealed packages subject to letter postage, in the mail can be opened and examined only under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one’s own household. The Constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.

*Id.* at 732.

18. Compare the definition of “relevance,” *supra* notes 6–8 and accompanying text, to the standard definition of “probable cause,” as a level of certainty approaching a more likely than not finding. See LAFAYE ET AL., *supra* note 5, at 90–91 (stating that some Supreme Court cases “may be read as adopting a more-probable-than-not test”). Although this source also notes that lower courts do not tend to apply this high of a standard when it is known that a serious crime has been committed and immediate apprehension is necessary, that situation rarely occurs in connection with document searches. See *id.*

real possibility if destruction occurs.<sup>19</sup> Shredding of documents is a more likely response to a subpoena aimed at an individual's personal records, but even here obstruction penalties tend to inhibit it.<sup>20</sup>

More importantly, personal information can usually be obtained via a third-party subpoena, which of course eliminates the possibility the target will destroy the evidence and, in many settings, also eliminates the target's ability even to challenge the government's action.<sup>21</sup> The supposed advantage of a warrant over this type of subpoena is that it will produce more or better records because the third party may not have the information the government wants. But that is a trivial advantage in today's world. Most aspects of our personal life that have been reduced to writing or digitized are stored with some third party. Volumes of data about us can be found in "public" records maintained by the government, and even more data is deposited with hospitals, banks, schools, stores, and Internet Service Providers.<sup>22</sup> Under current law, all of this information is just a subpoena (or less) away. In light of these facts, it is not surprising that law enforcement rarely resorts to a warrant to obtain documents and records.<sup>23</sup>

The following discussion explains how this regulatory regime developed. It begins with the constitutional law governing first-party subpoenas—subpoenas for papers held by the individual whose activities are described in the papers. It then examines the law of third-party subpoenas.

19. Cf. Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 *FORDHAM J. CORP. & FIN. L.* 721, 750–56 (2003) (describing the discovery of document shredding that occurred at the Arthur Andersen accounting firm in connection with the Enron scandal).

20. The potential penalties for obstruction minimize or negate the temptation to destroy documents:

While . . . suspects may be tempted to destroy evidence when it is called for by a subpoena, there is at least a somewhat greater chance that the evidence will be produced, since the failure to produce the evidence may be punishable by contempt and the destruction of the evidence may constitute obstruction of justice.

BEALE ET AL., *supra* note 2, at 6–6–6–7.

21. See, e.g., 18 U.S.C. §§ 2703(c)(1)(E) & (d) (2000) (under the ECPA, a subpoena for subscriber information and account logs may only be challenged by a third party); *SEC v. Jerry T. O'Brien, Inc.* 467 U.S. 735 (1984) (holding that the Fourth Amendment does not require notice to the target of a third-party subpoena); ELLEN S. PODGOR & JERRY H. ISRAEL, *WHITE COLLAR CRIME IN A NUTSHELL* 252, 269 (2004) (noting that generally the target of a subpoena has no standing to contest either grand jury or administrative subpoenas directed at third parties, although also noting that Congress has authorized such standing with respect to subpoenas of bank records, stored electronic communications, and tax records).

22. See *infra* text accompanying notes 118–119.

23. Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After United States v. Hubbell—New Protection for Private Papers?*, 29 *AM. J. CRIM. L.* 123, 128 (2002) (“Subpoenas are used much more frequently than search warrants . . .”).



### A. Subpoenas Directed at the Target

The origin of the subpoena for documents can be traced back at least to the time of King Charles II in the late seventeenth century.<sup>24</sup> But it appears that these subpoenas were common only in civil litigation; even at their inception, courts hesitated to allow their use in criminal cases. In 1748, the King's Bench cited cases from 1703 and 1744 in emphasizing that a court may not "make a man produce evidence against himself, in a criminal prosecution."<sup>25</sup> A number of other eighteenth century English courts straightforwardly held that the government could never demand a person's books and papers.<sup>26</sup> By the time the American Constitution was drafted, the matter was well settled. As Professor Nagareda has noted, "All sources to address the point concur that common law at the time of the Fifth Amendment barred the compelled production of self-incriminatory documents."<sup>27</sup>

American judicial decisions in the nineteenth century appeared to follow this English common law, although a few did allow compelled production in criminal and quasi-criminal cases.<sup>28</sup> The issue probably

24. *Wertheim v. Continental Ry. & Trust Co.*, 15 F. 716, 722 (C.C.S.D.N.Y. 1883) ("No trace of the use of this writ [subpoenas *duces tecum*] by the common-law courts of England is to be found in the books earlier than the time of Charles II.").

25. *King v. Purnell*, 96 Eng. Rep. 20 (K.B. 1748) (citing *Queen v. Mead*, 92 Eng. Rep. 119 (K.B. 1703)); *King v. Cornelius*, 93 Eng. Rep. 1133 (K.B. 1744)).

26. *Chetwind v. Mernell, Exr.*, 1 Bos. & P. 271 (1798); *Rex v. Dixon*, 3 Burrows Reps. 1687 (1765); *Rex v. Cornelius*, 2 Strange Reps. 1210 (1728); *Rex v. Worsenham*, 91 Eng. Rep. 1370 (K.B. 1701). As summarized in *United States v. Three Tons of Coal*, these decisions "accomplished the permanent overthrow in England, of the right at common law to search for and seize the private papers of the citizen, for the purpose of convictions for crime, or for the purpose of recovery in civil causes, where the evidence when produced would convict of a felony." 28 F.Cas. 149, 151-52 (D.C. Wis. 1875) (No. 16516).

27. Richard A. Nagareda, *Compulsion "To Be a Witness" and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575, 1619 n.172 (1999).

28. *United States v. Reyburn*, 31 U.S. 352, 363 (1832) ("The privilege of refusing to [produce a document] is one, personal to [the target] himself, of which he may avail himself or not at his pleasure."); *Mitchell's Case*, 12 Abb. Pr. 249 (N.Y. Sup. Ct. 1861) (holding that neither parties nor their attorneys "could be required to produce documents to be used in evidence, if the production of the paper might materially affect the rights or prejudice the interests of the witness or person to whom it belonged"); *Ex parte Maulsby*, 13 Md. 625, 639 (1859) (quoting 1 STARKIE'S EVID. 86 to the effect that while a person may be compelled to answer questions orally, he is not "compellable" to produce documents "when the production might prejudice his civil rights"); *Bull v. Loveland*, 27 Mass. 9, 14 (1830) ("a witness may be called and examined in a matter pertinent to the issue, where his answers will not expose him to criminal prosecution, or tend to subject him to a penalty or forfeiture" and equating compulsion of a witness to compulsion under a subpoena *duces tecum*); *Anonymous*, 8 Mass. 370 (1811) (holding that counsel had no duty to deliver his client's papers to the grand jury). See generally *McKnight v. United States* 115 F. 972, 980 (6th Cir. 1902) (summarizing nineteenth century law as holding that "it would be beyond the power of the court to require the accused to criminate himself by the production of the paper as evidence against himself" and reversing a conviction in which the defendant was

did not arise that often in the United States, just as it was seldom litigated in England.<sup>29</sup> Documents sometimes could be obtained from a source other than the suspect, which occasioned no Fifth Amendment issue,<sup>30</sup> and might also occasionally be obtained through a search based on a warrant. In any event, street crime usually did not generate documentary evidence, and state regulation of business crimes, which was an area of regulation that was much more likely to demand documents via subpoena, was in its infancy until late in the nineteenth century.<sup>31</sup>

It was a regulatory case, involving nonpayment of taxes, that provided the peak of constitutional protection for papers in the United States. The case was *Boyd v. United States*,<sup>32</sup> handed down by the U.S. Supreme Court in 1886. Consistent with the early English common law, *Boyd* held that using a subpoena to force an individual to produce private documents violated the Fifth Amendment's prohibition against compelled testimony.<sup>33</sup> But Justice Joseph P. Bradley's opinion for the Court added a new twist to the analysis, holding that such subpoenas also violated the Fourth Amendment's prescription against unreasonable searches and seizures.<sup>34</sup> The Court came to this conclusion even though the defendant company was subject only to civil sanctions (which undermines an argument based on the Fifth Amendment's prohibition of compelling testimony in criminal cases),

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required to produce a document at trial). However, a number of nineteenth century federal cases upheld subpoenas for documents relating to taxes and fees. See, e.g., *United States v. Hutton*, 26 F. Cas. 454 (S.D.N.Y. 1879) (No. 15433); *United States v. Hughes*, 26 F. Cas. 417 (C.C.N.Y. 1875) (No. 15417). See also *United States v. Tilden*, 28 F. Cas. 174, 177 (S.D.N.Y. 1879) (No. 15622) (stating, in a tax case, that "while the law jealously protects private books and papers from unreasonable searches and seizures . . . yet the principle is equally strongly held that parties litigant have the right to have private writings which are competent for proof in their causes produced in evidence," and permitting such production upon "preliminary proof of the necessity").

29. Indeed, the Supreme Court asserted in 1886 that a congressional act passed in 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.

*Boyd v. United States*, 116 U.S. 616, 622–23 (1886).

30. Cf. *United States v. Reyburn*, 31 U.S. 352, 355 (1832) (holding that "secondary" evidence may be used when the defendant will not produce the relevant document). See also *infra* notes 92–94 and accompanying text.

31. For a history of regulation by government during this period, see RICHARD HOFSTADTER, *THE AGE OF REFORM* (1955) (discussing populism and progressivism from 1890 to 1940). See also HARRY FIRST, *BUSINESS CRIME 2* (1990) (stating that "[t]he initial era of federal regulation began with the Interstate Commerce Act of 1887").

32. 116 U.S. 616 (1886).

33. See generally *id.*

34. *Id.* at 621–22.

and even though the documents at issue in *Boyd* were not personal papers, but merely invoices used to prove fraudulent importation of goods (which are hardly the types of intimate papers most closely associated with the privacy interests the Fourth Amendment protects).<sup>35</sup> Dismissing these objections as mere quibbles,<sup>36</sup> Justice Bradley stated:

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.<sup>37</sup>

This strong affirmation by the highest court in the land of what had previously been, in the United States at least, an ambiguous constitutional protection for papers had potentially major repercussions. As Professor William Stuntz has noted, *Boyd’s* holding, if allowed to stand, would have seriously undermined the modern regulatory state, which at that time was just building up steam.<sup>38</sup> Without the ability to readily obtain the records of corporations, partnerships, and other entities, government agencies would be frustrated in their efforts to ensure that corporate tax laws, bank laws, securities laws, and a host of other regulatory statutes were enforced.

For precisely that reason, within twenty years the Court had reversed itself. In the 1906 case of *Hale v. Henkel*,<sup>39</sup> the defendant corporation, suspected of antitrust violations, relied on *Boyd* in arguing that a grand jury subpoena for its documents violated both the Fifth and Fourth Amendments.<sup>40</sup> In finding for the government, the Court rejected the interpretation of the Fifth Amendment that it had adopted in *Boyd*, and limited the Fourth Amendment’s relevance in subpoena cases to a prohibition of overbroad requests. Acceptance of the corporation’s Fifth Amendment claim, the Court stated, “would

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35. *Id.* at 618.

36. Specifically, Justice Bradley held for the Court that, although a suit for a civil penalty was not within the “literal terms” of either amendment, it was “quasi-criminal [in] nature” and thus within their spirit. *Id.* at 633, 634.

37. *Id.* at 633.

38. William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 428 (1995).

39. 201 U.S. 43 (1906).

40. *Id.* at 71.

practically nullify the whole act of Congress [that outlawed monopolies]. 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?"<sup>41</sup> For similar reasons, the Court held that the Fourth Amendment did not prevent use of a subpoena *duces tecum* to compel the production of documentary evidence. Quoting an English decision, the Court stated, "it would be 'utterly impossible to carry on the administration of justice' without this writ."<sup>42</sup>

The move toward the current regime of virtually unlimited subpoena power was not immediate, however. In *FTC v. American Tobacco Co.*,<sup>43</sup> decided in 1924, a unanimous Court held that federal antitrust law required the Federal Trade Commission to provide "[s]ome evidence of the materiality of the papers demanded" by an administrative subpoena.<sup>44</sup> Although the holding was based on an interpretation of a statute, the Court, per Justice Holmes, also stated that "[a]nyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire and to direct fishing expeditions into private papers."<sup>45</sup> Other Supreme Court and lower court cases exhibited similar resistance to blind sanctioning of subpoenas administered by agencies.<sup>46</sup>

By the mid-1940s, however, the Court had carried through to its logical conclusion *Hale's* assertion that significant restrictions on the government's subpoena power would unduly stymie regulatory investigative efforts. In 1946, in *Oklahoma Press Co. v. Walling*,<sup>47</sup> the Court canvassed the relevant authorities and concluded that

the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is

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41. *Id.* at 70.

42. *Id.* at 73 (quoting *Summers v. Moseley*, 2 Cromp. & M. 477 (1834)).

43. 264 U.S. 298 (1924).

44. *Id.* at 306.

45. *Id.* at 305–06 (citation omitted).

46. *See, e.g., Jones v. SEC*, 298 U.S. 1, 27 (1936) ("An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact."). *See also FTC v. Smith*, 34 F.2d 323, 324–25 (S.D.N.Y. 1929) (requiring probable cause before a subpoena could be enforced); *FTC v. P. Lorillard Co.*, 283 F. 999, 1006 (S.D.N.Y. 1922), *aff'd on other grounds sub nom, FTC v. Am. Tobacco Co.*, 264 U.S. 298 (1924).

47. 327 U.S. 186 (1946).

one the demanding agency is authorized by law to make and the materials specified are relevant.<sup>48</sup>

*Oklahoma Press* even insinuated that a subpoena is not an “actual search” meriting Fourth Amendment protection.<sup>49</sup> Although this dictum was glossed over four years later in *United States v. Morton Salt Co.*,<sup>50</sup> the Court adhered to the notion that “it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.”<sup>51</sup> Indeed, “[e]ven if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.”<sup>52</sup> In *United States v. Powell*,<sup>53</sup> decided in 1964, the Court reiterated that a government agency subpoena for records is valid if the records are “relevant” to an investigation conducted for a “legitimate purpose” (meaning one authorized by statute).<sup>54</sup> As applied, the *Powell* relevance standard is extremely easy to meet.<sup>55</sup>

What has seldom been noted, however, is that all of these cases involved government attempts to obtain corporate or other business documents. Throughout the first half of the twentieth century, the Court had intimated that subpoenas for private records might have to meet a higher standard. For instance, in *Hale* the Court stated “there

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48. *Id.* at 208.

49. *Id.* at 195 (stating that “the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made”).

50. 338 U.S. 632 (1950).

51. *Id.* at 652.

52. *Id.*

53. 397 U.S. 48 (1964).

54. *Id.* at 57–58.

55. *See, e.g., United States v. Hunton & Williams*, 952 F. Supp. 843, 854 n.28 (D.D.C. 1997) (noting that the *Powell* inquiry is more deferential than the “arbitrary and capricious” standard of review for agency action under the Administrative Procedure Act). *See also United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 316 (1978) (holding that bad faith on the part of an individual bureaucrat is insufficient to invalidate an administrative subpoena under *Powell*). The latter case also held that an administrative summons may not be used as a criminal discovery device in tax cases. *Id.* at 318. This holding is now memorialized in statute 26 U.S.C. § 7602(d). Of course, at that point the grand jury continues the investigation, so the standard for issuing a subpoena does not change substantially.

A very small minority of federal courts have purported to require a greater evidentiary showing before issuing a subpoena but, if that is so, the showing is only minimally different. The case most frequently cited for this proposition is *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85 (3d Cir. 1973), which required the government to make “some preliminary showing by affidavit that each item requested [is] at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction and not sought primarily for another purpose.” *Id.* at 93.

is a clear distinction [in cases involving demands for production of books and papers] between an individual and a corporation.”<sup>56</sup> Because a corporation “is a creature of the State,” it “is presumed to be incorporated for the benefit of the public,” and it “receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter.”<sup>57</sup> But an individual “owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property.”<sup>58</sup> Thus, in contrast to the corporation, an individual retains the right to refuse “to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law.”<sup>59</sup>

In the years following *Hale*, Supreme Court and lower court cases frequently reiterated, albeit usually in dictum, that only corporate documents could be obtained pursuant to subpoena; private documents continued to be immune from compulsory process.<sup>60</sup> Four decades later the Court was still echoing these sentiments when, in *Oklahoma Press*, it characterized its earlier cases authorizing production of documents pursuant to a subpoena as applying “merely to the production of corporate records and papers.”<sup>61</sup> Shortly thereafter, in *Morton Salt*, the Court simply stated that “corporations can claim no equality with individuals in the enjoyment of a right to privacy.”<sup>62</sup>

In short, in the words of the Court’s majority opinion in *Griswold v. Connecticut*,<sup>63</sup> the Fifth Amendment created a “zone of privacy”

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56. *Hale v. Henkel*, 201 U.S. 43 (1906).

57. *Id.* at 74.

58. *Id.*

59. *Id.*

60. *See, e.g.*, *Wheeler v. United States*, 226 U.S. 478, 490 (1913) (“It was the character of the books and papers as corporate records and documents which justified the court in ordering their production.”); *Wilson v. United States*, 221 U.S. 361, 377 (1911) (“Undoubtedly [the privilege against self-incrimination] also protected him against the compulsory production of his private books and papers.”); *Linn v. United States*, 251 F. 476, 480 (2d Cir. 1918) (“While a person is privileged from producing his books in a prosecution against himself, a corporation is not privileged from producing its papers and books, even though they incriminate the officer who produces them.”); *Flagg v. United States*, 233 F. 481, 484 (2d Cir. 1916) (holding invalid a subpoena for personal books and papers); *Hillman v. United States*, 192 F. 264, 266 (9th Cir. 1911) (“It will be observed that in the plea there is no distinct averment that any of the books or papers so taken upon the subpoena duces tecum were the private books or papers of the plaintiff in error.”); *United States v. Hart*, 214 F. 655, 661 (N.D.N.Y. 1914) (“Hart could not have been compelled to produce these [private] papers and documents by subpoena duces tecum without gaining immunity for himself.”).

61. 327 U.S. 186, 208 (1946). *See also* *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 726 (1944) (“The Fifth Amendment does not protect a corporation against self-incrimination through compulsory production of its papers, although it does protect an individual.”).

62. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

63. 38 U.S. 479 (1965).

around personal papers.<sup>64</sup> From our perspective in the twenty-first century, the Fourth Amendment seems a more appropriate source of law for establishing privacy zones. But *Hale* had emasculated the Fourth Amendment, at least in the subpoena context.<sup>65</sup> Thus, for the twentieth century Supreme Court, it was the Fifth Amendment or nothing.

Eventually, it turned out to be nothing, or almost nothing. A signal of things to come was the perplexing and seldom discussed opinion in *Ryan v. United States*.<sup>66</sup> Decided in 1964 on the same day as *Powell*, and a year before *Griswold*'s "zones of privacy" dictum,<sup>67</sup> *Ryan* blithely announced that the minimal *Powell* requirements for administrative subpoenas aimed at corporations governed subpoenas for private tax records as well.<sup>68</sup> The Court reached this conclusion "for the reasons given in [*Powell*],"<sup>69</sup> without any further discussion. And *Powell*'s holding that probable cause need not be demonstrated to obtain corporate tax records rested *solely* on an interpretation of the relevant statutory language.<sup>70</sup> The *Powell* opinion (and therefore *Ryan*) did not mention the Fifth Amendment. Nor did it even refer to the Fourth Amendment, the ostensible basis of the petitioner's claim in *Ryan*.<sup>71</sup> Thus, with one perfunctory statement that did not purport

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64. *Id.* at 484 ("The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.").

65. In the *search warrant* context, by contrast, the Court for a time relied on a combination of the Fourth and Fifth Amendments to *prohibit* seizure of private papers, under the so-called "mere evidence" doctrine. *Gouled v. United States*, 255 U.S. 298, 309 (1921) (citing *Boyd v. United States* in holding that search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding"). This doctrine is tangential to the subject of this Article, which focuses on subpoenas, and in any event has also since been emasculated. *See, e.g., Zurcher v. Stanford Daily*, 436 U.S. 547, 558 (1978) ("Once it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime."); *Warden v. Hayden*, 387 U.S. 294, 301 (1967) ("Nothing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband."). It is also worth emphasizing that the doctrine was based more on the Fifth Amendment than the Fourth. *See Gouled*, 255 U.S. at 306 (stating that whether private papers are seized from a person via a warrant or a subpoena, "[i]n either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case").

66. 379 U.S. 61 (1964).

67. *Griswold*, 38 U.S. at 484.

68. *Id.*

69. *Id.* at 62.

70. *Powell*, 379 U.S. at 52-56.

71. The petitioner argued, among other things, that the IRS needed probable cause to obtain his records. *Ryan*, 379 U.S. at 62. However, the petitioner did not make an explicit Fourth Amendment argument, relying instead on statutory language.

to address constitutional concerns, the Court seemed to obliterate the sixty-year-old distinction between corporate and personal records in connection with the subpoena process.<sup>72</sup>

Because of its opacity, however, *Ryan* left some doubt as to the application of the Constitution to subpoenas. Indeed, in *United States v. Dionisio*,<sup>73</sup> decided nine years later, the Court seemed to have forgotten all about *Ryan*. There, the Court held that neither the Fifth Amendment nor the Fourth Amendment invalidated a grand jury subpoena for a voice exemplar, on grounds consistent with previous law: The sound of a person's voice is not "testimony" within the meaning of the Fifth Amendment, and is not associated with Fourth Amendment expectations of privacy because it is routinely exposed to the public.<sup>74</sup> More importantly for present purposes, however, the *Dionisio* Court continued to assert, in apparent contrast with *Ryan*, that the grand jury "cannot require the production by a person of private books and records that would incriminate him," and cited *Boyd*.<sup>75</sup> Although *Dionisio* involved a grand jury subpoena, whereas *Ryan* dealt with an administrative summons, the demands for production in these cases were both pursuant to law enforcement investigations and thus were functionally identical.<sup>76</sup>

*Ryan* might have been limited to production of personal tax records by analogizing such records to corporate documents and invoking *Hale's* necessity rationale. Both types of records, it could be argued, must be maintained and readily disclosed for the modern regulatory state to function. Support for this distinction could be found in the Court's decision in *Couch v. United States*,<sup>77</sup> decided the same year as *Dionisio*. Noting that federal law requires disclosure of much of the information in tax records, the Court in *Couch* stated that in a "situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive . . . [a person] cannot reasonably claim, either for Fourth or Fifth Amendment purposes, an expectation of protected privacy or confidentiality."<sup>78</sup> Perhaps this reasoning could have differentiated government attempts to obtain tax records from its efforts to obtain other types of private fi-

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72. *Id.*

73. 410 U.S. 1 (1973).

74. *Id.* at 7 (Fifth Amendment analysis); *id.* at 14 (Fourth Amendment analysis).

75. *Id.* at 11.

76. The records in *Ryan* were sought in conjunction with civil, rather than criminal, proceedings, but the fact remains that the records could have been used in a criminal prosecution against *Ryan*.

77. 409 U.S. 322 (1973).

78. *Id.* at 335-36.



nancial records, as well as medical, educational, and similar personal information held in record form.

But that is not the route the Court chose to take. Rather, in 1976 it discarded all of the language, from *Boyd* through *Dionisio*, regarding the distinction between personal and business papers. *Fisher v. United States*,<sup>79</sup> like *Ryan*, involved a tax summons for personal records but, unlike *Ryan*, *Fisher* directly repudiated the Fifth Amendment *Boyd* claim in a way that appeared to apply to all documents, not just tax records. More specifically, *Fisher* suggested that subpoenas virtually never implicate the Fifth Amendment's prohibition of compelled self-incrimination, either because they do not compel information or because, if they do, the information they compel is not self-incriminating.<sup>80</sup> First, the Court noted, a subpoena does not force the *creation* of documents, and thus the disclosure of document content demanded by a subpoena does not implicate the Fifth Amendment's prohibition of compelled self-incrimination.<sup>81</sup> Second, *Fisher* held that while a subpoena does compel the *production* of documents, that act does not provide the government with any useful incriminating information, at least when proof of the source of the documents is not an important element of the prosecution's proof or the government can prove the source in some other way (which is often the case).<sup>82</sup>

The importance of *Fisher* is that it shifted Fifth Amendment analysis from a "zone of privacy" focus to a focus on coercion. As the Court said, "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."<sup>83</sup> Because the content of private documents are no more compelled than the content of business documents, *Fisher* appeared to repudiate the impersonal-corporate versus personal-individual distinction that earlier cases had emphasized. Indeed, eight years after *Fisher*, Justice Sandra Day O'Connor felt confident enough to assert that "the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind."<sup>84</sup>

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79. 425 U.S. 391 (1976).

80. *Id.* at 409.

81. *Id.* at 409-10. *Fisher* involved compulsion of documents from the defendant's accountant, but *Fisher's* reasoning clearly applied to compulsion of documents from the defendant himself, as the Court later made clear in *United States v. Doe*, 465 U.S. 605 (1984).

82. For example, in most tax cases "[t]he existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." *Fisher*, 425 U.S. at 411.

83. *Id.* at 401.

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

That is not the end of the story, however. Subsequent cases indicate that the *act of producing* papers may be more likely to reveal incriminating information than *Fisher* suggested. For instance, in *Braswell v. United States*,<sup>85</sup> decided twelve years after *Fisher*, the Court held that while the custodian of records generally may not resist a subpoena on the grounds that production might incriminate him personally, he should be able to prevent the government from mentioning that he was the custodian. The Court also stated that the custodian might even be able to avoid handing over the records in the first place if he could show, for instance, “that he is the sole employee and officer of the corporation [and] that the jury would [thereby] conclude that he produced the records.”<sup>86</sup> And, in *United States v. Hubbell*,<sup>87</sup> decided in 2000, the Court held that, where the location and identity of the documents demanded by a subpoena are not known by the government beforehand, then compelling their production from the target of the investigation implicates the Fifth Amendment.<sup>88</sup> In that situation, the respondent is forced to take “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.”<sup>89</sup>

Perhaps *Hubbell* moves Fifth Amendment analysis partially back toward *Boyd*. Some commentators have gone so far as to say that *Hubbell* requires probable cause in order to obtain a valid subpoena for documents sought from the target.<sup>90</sup> That is probably an exaggeration of that decision’s impact, especially where only a few documents are sought and the target need not guess what the government is after.<sup>91</sup> But even if *Hubbell* does reintegrate the Fourth and Fifth

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85. 487 U.S. 99 (1988).

86. *Id.* at 118 n.11.

87. 530 U.S. 27 (2000).

88. *Id.*

89. *Id.* at 42.

90. William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 865 (2001) (“[A]fter *Hubbell*, the working rule will be something like the following: When faced with subpoenas for documents, suspects can comply or not as they wish. For its part, the government can search for the evidence it wants, so long as it satisfies the probable cause and warrant requirements.” (footnotes omitted)). See also Cole, *supra* note 23, at 188–89 (“After *Hubbell*, . . . prosecutors who take the subpoena approach may face a burden comparable to that presented by the probable cause and particularity requirements for obtaining a search warrant.”).

91. See LAFAYE ET AL., *supra* note 5, at 39 (2005 Pocket Part) (noting that many subpoenas provide enough information about the documents sought that the target need not use the “contents” of his mind to identify them, and stating that “there is nothing in *Hubbell*’s discussion of the foregone conclusion doctrine that mandates . . . a conclusive showing on the temporal components of existence and possession”).

Amendments, it does not affect the lion's share of subpoenas that seek personal papers, because most of these are directed at third parties, not at those who are the subject of the records.

### B. *Third-Party Subpoenas*

While early twentieth century cases adhered to the idea that the Fifth Amendment prohibited access to personal papers held by the target, they just as clearly stated that the Fifth Amendment does not prohibit compelling third parties to produce documents that are later used against the target. A 1913 decision by the Supreme Court put the matter quite pithily: "A party is privileged from producing evidence but not from its production."<sup>92</sup> The one exception to this rule, recognized at least as far back as the eighteenth century,<sup>93</sup> was that records given to an attorney were protected to the same extent as they would be if retained by their owner. *Fisher* continued to recognize this exception as a means of honoring the attorney-client privilege.<sup>94</sup> But once *Fisher* reduced the scope of the Fifth Amendment privilege for targets, the extent to which attorneys could rely on the Fifth Amendment to resist a subpoena aimed at client records was correspondingly limited.

That treatment of the Fifth Amendment left the Fourth Amendment as the only feasible protector of personal records held by third parties.<sup>95</sup> Although *Hale* had made clear that the Fourth Amendment places few restrictions even on document subpoenas directed at the target of an investigation, in 1967 the Supreme Court decided *Katz v. United States*.<sup>96</sup> That case appeared to liberalize Fourth Amendment

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92. *Johnson v. United States*, 228 U.S. 457, 458 (1913). See *Perlman v. United States*, 247 U.S. 7, 15 (1918). See also *First Nat'l Bank v. United States*, 267 U.S. 576 (1925) (holding that an Internal Revenue Service summons directed to a third-party bank does not violate the Fourth Amendment rights of either the bank or the person under investigation by the taxing authorities).

93. *Rex v. Dixon*, 97 Eng. Rep. 1047 (K.B. 1765) (holding that an attorney need not turn over a client's papers in connection with a forgery prosecution).

94. 425 U.S. at 405 (stating that "the papers, if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the attorney-client privilege").

95. Some have suggested that the First Amendment might protect very personal papers. See Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: the Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683, 702 (1982) (arguing that "the [F]irst [A]mendment can prevent the government from probing into a defendant's most personal papers"). The First Amendment might also provide protection for records necessary to carry out speech, such as records identifying e-mail users who use pseudonyms. See generally Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639 (1995). But even if the First Amendment should be so interpreted, it would not affect most document subpoenas.

96. 389 U.S. 347 (1967).

doctrine by rejecting a property-based, formalistic reading of the Fourth Amendment and establishing that its guarantees were meant to protect “expectation[s] of privacy . . . that society is prepared to recognize as ‘reasonable.’”<sup>97</sup> Given the private information potentially obtained via a subpoena, *Katz* opened up the possibility that the Court might require probable cause for a subpoena for personal information sought from third parties, or at least impose on third-party subpoenas restrictions roughly equivalent to that imposed on first-party subpoenas by the act-of-production doctrine.<sup>98</sup>

But within ten years of the *Katz* decision the Court had squelched any movement toward converting third-party subpoenas into warrants. The first intimation of its unwillingness to apply *Katz* to subpoenas came in *Couch v. United States*,<sup>99</sup> which involved seizure of records from the petitioner’s tax accountant. There the Court asserted that “there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return.”<sup>100</sup> At least that language left open a ruling that records *not* subject to mandatory disclosure would be afforded more Fourth Amendment protection. However, in *United States v. Miller*,<sup>101</sup> handed down the same day as *Fisher*, the Court obliterated even that possibility. In *Miller*, the Court decided that the Fourth Amendment imposes no restrictions on *any* type of third-party subpoena, other than those that protect the third party.<sup>102</sup>

The defendant in *Miller* argued that a subpoena *duces tecum* that required his bank to produce various records describing his financial dealings violated his Fourth Amendment rights. But the Court concluded, in effect, that Miller did not have standing to make this argument.<sup>103</sup> Referring to cases involving defendants who made

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97. *Id.* at 361 (Harlan, J., concurring). This language later came to define the scope of the Fourth Amendment. See *supra* note 14 and accompanying text.

98. Cf. *United States v. Hubbell*, 530 U.S. 27 (2000), described *supra* notes 87–89 and accompanying text.

99. 409 U.S. 322 (1973).

100. *Id.* at 335.

101. 425 U.S. 435 (1976).

102. *Id.* at 444. The Court held:

Since no Fourth Amendment interests of the depositor are implicated here, this case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time of the subpoena is issued.

*Id.*

103. *Id.* at 441.

incriminating disclosures to undercover agents,<sup>104</sup> the Court noted that it had “held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities.”<sup>105</sup> Just as a person who reveals intimacies to an acquaintance assumes the risk the acquaintance will be or turn into an informant, a bank depositor “takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government.”<sup>106</sup> The Court concluded, therefore, that Miller possessed no cognizable expectation of privacy in the financial information kept by his bank.

*Miller* left no doubt that the Court would reject a narrow interpretation of *Couch*. The records at issue in *Miller* were not subject to mandatory disclosure under the tax laws. Further, they described *all* of Miller’s financial activities with the bank, and included three monthly statements.<sup>107</sup> Yet these differences with *Couch* did not give the Court pause, as indicated by its declaration that the Fourth Amendment does not protect information in third-party records “even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”<sup>108</sup>

The Supreme Court has applied *Miller*’s rationale to phone company records<sup>109</sup> and loan applications,<sup>110</sup> and lower courts have used it to uphold subpoenas for personal records from medical institutions,<sup>111</sup>

104. The Court cited *Hoffa v. United States*, 385 U.S. 293 (1966) (holding that government use of an acquaintance as an informant is not a search), and *Lopez v. United States*, 373 U.S. 427 (1963) (holding that the use of a body bug on an informant is not a search). It also could have cited *United States v. White*, 401 U.S. 745 (1971) (holding, post-*Katz*, that the use of a body bug on an informant is not a search); *Lewis v. United States*, 385 U.S. 206 (1966) (holding that an undercover agent invited into a house is not conducting a search).

105. *Miller*, 425 U.S. at 443.

106. *Id.*

107. *Id.* at 438 (describing the information obtained as including “all checks, deposit slips, two financial statements, and three monthly statements”).

108. *Id.* at 443. This language and the result in *Miller* would also seem to undercut any distinction based on the precise nature of the financial information in question. *Cf.* *California Bankers Ass’n v. Shultz*, 416 U.S. 21 (1974) (holding that the Fourth Amendment does not protect negotiable instruments held by banks, which are exposed to numerous individuals and thus are arguably less private than the type of monthly statements involved in *Miller*).

109. *Smith v. Maryland*, 442 U.S. 735 (1979) (holding that there is no reasonable expectation of privacy in the identity of phone numbers that are routinely recorded by the phone company).

110. *United States v. Payner*, 447 U.S. 727 (1980) (holding that there is no reasonable expectation of privacy in a loan application turned over to a bank).

111. *Webb v. Goldstein*, 117 F. Supp. 2d 289 (E.D.N.Y. 2000); *State v. Guido*, 698 A.2d 729 (R.I. 1997); *Corpus v. State*, 931 S.W.2d 30 (Tex. App. 1996). See 1 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 2.7(d) (1996 & Supp. 2004) (citing various cases).

auditors and accountants,<sup>112</sup> trustees in bankruptcy,<sup>113</sup> and government institutions.<sup>114</sup> *Miller* also has been the basis for cases upholding federal statutes that permit government access to the records of Internet Service Providers and to stored e-mail.<sup>115</sup> Except in those cases where a third party objects on overbreadth grounds, the Fourth Amendment as construed in *Miller* appears to offer no protection for personal records held by third parties, regardless of how much information in those records is provided by the subject of the records or the contractual arrangements between the parties.

This position has assumed ever greater significance as innovations in computerization have made personal information both more likely to be communicated to third-party recordholders and more accessible. When *Hale* was decided, government recordkeeping was minimal and business recordkeeping was sparse.<sup>116</sup> Even in 1976, when *Miller* was handed down, the Information Age had not begun in earnest.<sup>117</sup> Today, government agencies keep detailed databases on many aspects of our lives,<sup>118</sup> banks and credit card companies maintain voluminous statements on our financial purchases, phone and Internet companies record our communications, hospitals develop computerized descriptions of our health problems, and digital records exist about our video

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112. *Wang v. United States*, 947 F.2d 1400, 1403 (9th Cir. 1991); *Kinney v. United States*, No. 96-550, 1995 WL 813170 (M.D. Fla. Feb. 1, 1996).

113. *In re Lufkin*, 255 B.R. 204, 211 (Bankr. E.D. Tenn. 2000).

114. *Doe v. DiGenova*, 642 F. Supp. 624 (D.D.C. 1986) (V.A. records); *People v. Carpenter*, 998 P.2d 531 (Cal. 1999) (prison and parole records).

115. *Guest v. Leis*, 255 F.3d 325, 336 (6th Cir. 2001) (holding that “plaintiffs . . . lack a Fourth Amendment privacy interest in their subscriber information because they communicated it to the systems operators”); *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (holding that defendant could not “claim to have a Fourth Amendment privacy interest in his subscriber information” because “[w]hen defendant entered into an agreement with Road Runner for Internet service, he knowing[ly] revealed” the information to his Internet Service Provider).

116. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1142 (2002) (“Public record-keeping is largely a product of the twentieth century.”); Allen D. Boyer, *Activist Shareholders, Corporate Directors and Institutional Investment: Some Lessons from the Robber Barons*, 50 WASH. & LEE L. REV. 977, 1030 (1993) (stating that until the end of nineteenth century, “business records . . . simply monitored expenses and income”).

117. Thomas A. Stewart & Jane Furth, *The Information Age in Charts*, FORTUNE, Apr. 4, 1994, at 75, 75 (asserting that 1991 signified the definitive end of the Industrial Age and the beginning of the Information Age, because in that year business expenditures on computers and communications for the first time exceeded the amount spent on industrial, agricultural, and construction machinery).

118. Solove, *supra* note 116, at 1143 (stating that “[t]oday, a welter of public records is kept by federal, state, and local governmental entities,” and noting that public records include information about birth, death, marriage, licenses, personal characteristics, real estate information, voting, and court appearances).

rentals, library borrowing, and travel destinations.<sup>119</sup> To obtain access to all of this information, *Miller* requires, at most, a showing of relevance.

C. *Summary: From Complete to Virtually Nonexistent Protection*

At the end of the nineteenth century, *Boyd* affirmed the common law ban on government efforts to obtain incriminating papers from their owners. Although that ban was soon lifted for business papers, only in the last quarter of the twentieth century did the Court relax constitutional strictures on subpoenas for self-incriminating personal papers. In contrast, constitutional restrictions on subpoenas for papers in the possession of third parties have always been lax. The historical change in this setting has not been in the law, but in the extent to which personal information is now housed with third parties.

The end result of these developments is that, as a constitutional matter, the minimal relevance standard once used primarily in connection with business subpoenas now authorizes access to vast amounts of personal information, to wit, *any* personal information that is in record form, with the possible exception of information found in records possessed by the target that the government is not sure exist. On the surface, at least, that regime seems to conflict with the Fourth Amendment's injunction that searches and seizures of papers, as well as of houses, persons, and effects, are unreasonable unless authorized by a warrant based on probable cause. To determine whether the current system is justifiable, a closer look at its possible rationales is necessary.

### III. RATIONALES FOR DEREGULATING SUBPOENAS

The case law recited above relies, directly or indirectly, on a number of justifications for continuing to leave subpoenas largely unregulated. The discussion below separates these justifications into six

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119. One description of the proliferation of records in the possession of private companies comes from Professor Solove:

Credit reports contain financial information contained in public records such as bankruptcy filings, judgments and liens, as well as information relating to mortgage foreclosures, checking accounts, and a list of all companies that requested the individual's credit file. Some companies also prepare investigative consumer reports, which supplement the credit report with information about an individual's character and lifestyle. . . . In addition to credit card records, there are cable television records, video rental records, phone records, travel records, and so on. The Medical Information Bureau (MIB), a nonprofit institution, maintains a database of medical information on fifteen million individuals, which is available to over 700 insurance companies.

Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1408-09 (2001) (footnotes omitted).

rationales. The first four can be characterized as arguments that subpoenas do not involve a “search” for Fourth Amendment purposes because they do not infringe upon reasonable expectations of privacy, while the last two focus on the strength of the government’s interest in keeping subpoenas unregulated. The first and last rationales apply to all subpoenas, whereas the rest focus on third-party subpoenas. The conclusion I reach is that, where business and other entity crime is concerned, a few of these rationales do support relaxed strictures on subpoenas, but none justify permitting government to obtain personal records merely on a showing of relevance.

### A. *Subpoenas Are Not Intrusive*

In his concurring opinion in *Hale*, Justice McKenna took the majority to task for even suggesting that the Fourth Amendment applied to subpoenas.<sup>120</sup> In contrast to the traditional search, he argued, the subpoena does not involve “trespass or force” and “cannot be finally enforced except after challenge.”<sup>121</sup> Forty years later, in *Oklahoma Press*,<sup>122</sup> a majority of the Court echoed these sentiments, stating that subpoenas do not trigger “actual searches,” because they do not require a physical intrusion; rather, they are, at most, “constructive” searches carried out by the target him or herself.<sup>123</sup> Thus, several Supreme Court justices have suggested that document subpoenas are not Fourth Amendment searches for the following reasons: (1) They rely on the recordholder, not the government, to produce the documents; (2) the target can challenge them before surrendering any items; and (3) they do not involve physical trespass or intrusion.

If the scope of the Fourth Amendment is to be determined with reference to reasonable expectations of privacy, all three of these lesser-intrusion rationales for the minimal restrictions on subpoenas are specious. The fact that it is the target (or a third party) rather than the police who locates the documents obviously does not change the nature of the revelations they contain, which can include information about medical treatment, finances, education, the identity of one’s communicants, and even the contents of one’s communications. The target’s ability to challenge a subpoena, while it may inhibit some fishing expeditions, at most will only delay government access to the records, unless something beyond the current relevance standard is applicable; recall also that, for many types of subpoenas, the target

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120. 201 U.S. 43, 79 (1906) (McKenna, J., concurring).

121. *Id.* at 80 (McKenna, J., concurring).

122. 327 U.S. 186 (1946).

123. *Id.* at 195, 202.



has *no* right of challenge.<sup>124</sup> And if the notion that searches only occur when the government engages in physical invasion of private space were correct, then electronic surveillance and technologically assisted physical surveillance of the home would not be a search, since neither usually requires a trespass or use of force. Yet the Supreme Court has firmly declared that both of the latter types of government action are governed by the Fourth Amendment and require warrants based on probable cause.<sup>125</sup>

While the technological surveillance example demonstrates why physical intrusiveness should not be dispositive on the search issue, it does not necessarily dictate that all document subpoenas be based on probable cause. First, not all records are easily categorized as sufficiently private to warrant the degree of constitutional protection provided to communications and activities that take place inside the home. In particular, business records—the type of records involved in all of the Supreme Court’s early subpoena cases—might be considered much less personal than individual medical, financial, and e-mail records; as the history described above makes clear,<sup>126</sup> the Court has routinely recognized as much in a number of cases. Second, even when the records sought are personal in nature, the rules governing technological surveillance do not appear to apply when the records are held by third parties, because generally only those subjected to technological surveillance may challenge it.<sup>127</sup> This limitation derives from well-established doctrine that the Fourth Amendment’s protections can be asserted only by those whose own private enclave is infringed by the government’s action.

### *B. Third-Party Subpoenas Do Not Infringe the Target’s Privacy*

That doctrine is, of course, the putative basis of the Court’s opinion in *United States v. Miller* where, it will be remembered, the Court held that one cannot challenge government access to personal information possessed by a third-party recordholder because one has surrendered it “voluntarily” and thus “assumes the risk” that the third party will provide it to the government.<sup>128</sup> But *Miller*’s version of Fourth

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124. See *supra* note 21 and accompanying text.

125. See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001) (using a thermal imaging device to detect heat differentials inside a house is a search); *Katz v. United States*, 389 U.S. 347 (1967) (bugging of a phone booth is a search requiring a warrant).

126. See *supra* notes 56–62 and accompanying text.

127. The one exception to this rule is when the challenger, although not a party to the intercepted conversation, owns the house in which the conversation takes place. See *Alderman v. United States*, 394 U.S. 165, 176 (1969).

128. See *supra* notes 102–108 and accompanying text.

Amendment standing is easily challenged. In fact, there are *two* significant problems with the Court's reasoning in that case.

The first problem, as many have pointed out, is that the Court simply defies reality when it says that one "voluntarily" surrenders information to doctors, banks, schools, and phone and Internet Service Providers.<sup>129</sup> It is impossible to get treatment, engage in financial transactions, obtain an education, or communicate with others without providing personal information to the relevant entities or allowing those entities to collect it. To "choose" to forego these activities would mean an isolated, unproductive, and possibly much foreshortened existence. The undercover agent cases, on which *Miller* relied, involve an entirely different dynamic, where refusing to interact with a particular individual is a realistic option.<sup>130</sup> *Miller* transforms *all* recordkeeping institutions into undercover agents, which all but hermits are powerless to avoid.

Even if the choice to reveal personal information to a third party or to allow a third party to collect it could somehow be characterized as voluntary, the *Miller* Court's second key assertion—that one thereby "assumes the risk" that the third party will convey it to the government<sup>131</sup>—is pure judicial fiat. As I have written elsewhere, "we only assume those risks of unregulated government intrusion that the courts tell us we have to assume."<sup>132</sup> Perhaps more to the point, even though *Miller* has been the law for three decades, most people probably would be surprised to learn that banks hand over financial information to the government virtually any time the government wants it.<sup>133</sup> A number of state courts have rejected, on state law grounds,

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129. *United States v. Miller*, 425 U.S. 435, 451 (1976) (Brennan, J., dissenting) (stating that "the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account"); LAFAYETTE ET AL., *supra* note 5, § 3.2(j).

130. See cases cited *supra* note 104.

131. 425 U.S. 435, 443 (1976).

132. Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J.L. & TECH. 383, 400 (1997).

133. In a study in which participants were asked to rank the "intrusiveness" of various government actions, "perusing bank records" was viewed as more intrusive than "searching [a] footlocker in a car" and a number of other government actions that require probable cause or at least reasonable suspicion. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727, 738 (1993).

*Miller's* precise holding regarding bank records,<sup>134</sup> and many others have declared that the decision does not apply to medical records.<sup>135</sup>

A variant of *Miller's* reasoning, found in many of the Supreme Court's Fourth Amendment cases, is that one lacks a reasonable expectation of privacy in places or items exposed to members of the public. These decisions, involving the Fourth Amendment's application to activities in public streets, open fields, curbsides, and backyards,<sup>136</sup> have justly been criticized as inappropriately grudging in their view of privacy.<sup>137</sup> In any event, they are only tangentially relevant in this context, since the information in most records is not knowingly given to anyone other than the third-party recordholder, and certainly is not exposed to the public in the same sense that activity on public streets or even one's backyard is.

To say *Miller* is wrong is not to say that third-party subpoenas always require probable cause, however. Again, certain types of records (for example, those summarizing a purchase) may not be entitled to as much protection as others (for example, those containing

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134. *Burrows v. Superior Court*, 529 P.2d 590 (Cal. 1974); *Charnes v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980); *Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979).

135. *King v. State*, 535 S.E.2d 432, 495 (Ga. 2000); *Thurman v. State*, 861 S.W.2d 96, 98 (Tex. Ct. App. 1993). See also *Doe v. Broderick*, 225 F.3d 440, 450–51 (4th Cir. 2000) (finding *Miller* inapplicable to medical records).

136. See, e.g., *California v. Ciraolo*, 476 U.S. 207, 214 (1986) (holding that a police flyover of defendant's backyard was not a search because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed"); *Oliver v. United States*, 466 U.S. 170, 179 (1984) (holding that police intrusion onto private property beyond the curtilage of the home is not a search because "[o]pen fields . . . are accessible to the public and the police in ways that a home, an office, or commercial structure would not be"); *United States v. Knotts*, 460 U.S. 276, 281–82 (1983) (holding that using a beeper to track the defendant was not a search because driving "over the public streets . . . voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property"). See also *California v. Greenwood*, 486 U.S. 35, 40 (1988) ("It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.").

137. Consider these remarks:

People who rummage through their neighbors' garbage, trespass on fenced-off fields, and stalk people, however, are criminals who intrude upon others' sense of security, safety, and privacy. We all risk falling prey to such criminals simply by carrying out our lives in an unobjectionable manner—putting out our garbage, taking solitary walks on private property, and going for drives in public. Taking these risks does not, however, represent consent or knowing exposure of our private lives, and does not render the criminal actions that sometimes follow innocuous, whether carried out by our neighbors or by the police.

Sherry F. Kolb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 *STAN. L. REV.* 119, 137 (2002).

medical and financial information).<sup>138</sup> The important point for present purposes is that the government should not have practically unrestricted access to records simply because the records reside with a third party.

### C. *Third-Party Records Belong to the Third Party*

*Miller* exempted third-party subpoenas from Fourth Amendment oversight by asserting that a person has no privacy interest in information surrendered to a third party.<sup>139</sup> One also might try to justify *Miller's* holding by focusing on the recordholder's, rather than the subject's, interest in the information. After all, the third party ostensibly "owns" the records, not only because it physically possesses them but because it creates them. Arguably, this property interest confers on the recordholder the right to assign the information, and eliminates the subject's control over it.<sup>140</sup> A variant of this argument asserts that permitting the subject to limit the third party's use of personal data unduly restricts the third party's interests in commercial freedom and freedom of speech.<sup>141</sup>

This "property" rationale has both a descriptive and a normative flaw. The descriptive problem is that, while the physical documents maintained by third-party recordholders may be the third party's property alone, their content generally is *not* wholly within their control. Indeed, federal law recognizes that individuals retain an interest even in information maintained in *public* records; under the Privacy Act they have a right to participate in the use, review, and disposal of

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138. I develop these distinctions in Slobogin, *supra* note 9, at 21–22. For another effort at addressing these distinctions in a specific context, see Deirdre K. Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 GEO. WASH. L. REV. 1557, 1579–83 (2004) (arguing that stored e-mails should receive enhanced protection because of (1) the "nature of the record," (2) the fact that, unlike the bank in *Miller* or the phone company in *Smith*, ISPs have no "independent interest" in the personal information, and (3) the fact that, unlike the defendants in those two cases, the recipient of the e-mail does not intend to disclose its contents to the ISP).

139. *Miller*, 425 U.S. at 443.

140. In *Perlman v. United States*, 247 U.S. 7, 15 (1918), the Court held that even continued ownership of property does not confer a constitutional interest in property that has been surrendered to a third party.

141. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1080–84 (2000). See also *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999) (overturning, on First Amendment grounds, Federal Communications Commission regulations requiring customer approval of use of personal information for marketing).

their files,<sup>142</sup> and the Freedom of Information Act circumscribes outsider access to a wide range of personal information.<sup>143</sup> Professor Mashaw has gone so far as to say that these two statutes “gave all citizens ‘property rights’ in the information held by government bureaus.”<sup>144</sup> If that is true of public records, it should surely be the case with privately held records such as those maintained by hospitals, banks, and schools because their contents are even more likely created under laws that give the subject some degree of control over them.<sup>145</sup>

The normative flaw in the property rationale is identical to the flaw in *Miller*. Third-party recordholders possess the personal information they do because people *must* give it to them in order to function in society; in property terms, the subjects are involuntary bailors of the information, and recordholders should be seen as their bailees. Recognition of this point does not mean that the individual can prevent the third party from using the information for the purpose for which it was obtained. But it should mean that the third party does not have total discretion to do whatever it wants with the information simply because it “owns” it.<sup>146</sup> In other words, the subjects of records should

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142. 5 U.S.C. § 552a(d) (2000) (entitling an individual to a copy of his or her record and “any information pertaining to him which is contained in the system,” and providing a procedure in contested cases, ultimately involving judicial review, for amending the record).

143. *Id.* § (b)(6) (prohibiting disclosure of “personnel and medical files, and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”); *id.* § (b)(7) (prohibiting disclosure of law enforcement records that “could reasonably be expected to constitute an unwarranted invasion of personal privacy”).

144. Jerry L. Mashaw, “Rights” in the *Federal Administrative State*, 92 *YALE L.J.* 1129, 1137 (1983) (“The Freedom of Information Act and the Privacy Act gave all citizens ‘property rights’ in the information held by government bureaus.”). See also Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 *STAN. L. REV.* 1373, 1436 (2000) (“Personally-identified data is neither unambiguously data processors’ property nor simply their speech . . .”).

145. See, e.g., 45 C.F.R. § 164.524 (2004) (providing individuals a right to copy and inspect their otherwise private health information under the Health Insurance Portability and Accountability Act of 1996); Fair Credit Reporting Act, 15 U.S.C. §§ 1681g–1681i (2000) (providing individuals a right to access their credit reports and insist upon corrections); Family Education Rights and Privacy Act, 20 U.S.C. § 1232q(a)(b) (2000) (requiring schools to provide parental access to student records and permitting parents to challenge the records if they are misleading, inaccurate, or violate the student’s privacy). Although no analogous statute for bank records exists, that is presumably because the customer either generates them (e.g., through checks) or receives a detailed periodic statement describing the information possessed by the bank, the latter of which can be corrected by the customer.

146. See *King v. State*, 535 S.E.2d 492, 495 (Ga. 2000) (“Even if the medical provider is the technical “owner” of the actual records, the patient nevertheless has a reasonable expectation of privacy in the information contained therein, since that data reflects the physical state of his or her body.”). An even stronger statement of this idea (perhaps too strong) is found in international laws and the laws of other countries. Consider, for instance, the United Nations Guidelines for the Regulation of Computerized Personal Files, G.A. Res. 45/95, U.N. GAOR, adopted

have standing to contest their disclosure to law enforcement unless the records were constructed for that purpose.

But suppose the third party has a “privacy policy” that specifically notifies the subject that information surrendered to it may be transmitted to other entities, including the government?<sup>147</sup> Then hasn’t one contracted away any property interest in the information? In theory, of course, a person should be able to consent to disclosure of personal facts. But, as Professor Daniel Solove has persuasively argued, contract and market-based models do not work well in this context.<sup>148</sup> We rarely have any real “relationship” with the third-party entities that acquire our information, possess virtually no bargaining power over them, are often ignorant of or confused about the third party’s privacy “offer,” and in any event frequently have no way to opt out of or fine-tune the “contract.”<sup>149</sup> As Professor Solove says, there is “a problem in the nature of the market itself that prevents fair and voluntary information transactions.”<sup>150</sup> That, of course, is the same sort of reason *Miller* is flawed.

#### D. *Subpoenas Duces Tecum Are Constitutionally Equivalent to Subpoenas Ad Testificandum*

The next argument that governmental requisition of records should be subject to minimal restrictions rests on an analogy to the law governing demands for testimony from a third party. Many witnesses subject to subpoena are not the targets of the investigation and thus will not be able to (or want to) assert the Fifth Amendment. Because the government can compel these third-party witnesses to reveal information about someone without demonstrating any suspicion re-

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Dec. 14, 1990, as General Assembly Resolution 45/95, reprinted in MARC ROTENBERG, *THE PRIVACY LAW SOURCEBOOK 2003: UNITED STATES LAW, INTERNATIONAL LAW, AND RECENT DEVELOPMENTS* 367 (2003). Under “Principle of the Purpose-Specification,” the Guidelines state:

The purpose which a file is to serve and its utilization in terms of that purpose should be specified, legitimate and, when it is established, receive a certain amount of publicity or be brought to the attention of the person concerned, in order to make it possible subsequently to ensure that: . . . (b) None of the said personal data is used or disclosed, except with the consent of the person concerned, for purposes incompatible with those specified.

*Id.* at 368.

147. See generally John Schwartz, *Privacy Policy Notices Are Called Too Common and Too Confusing*, N.Y. TIMES, May 17, 2000, at B1.

148. See generally DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* (2004).

149. *Id.* at 81–87.

150. *Id.* at 91.

garding that person, this argument posits, it should be able to obtain records from a third party under the same circumstances.<sup>151</sup>

Looked at more closely, however, this analogy between subpoena *ad testificandum* and subpoenas *duces tecum* does not work. Neither of the two reasons a witness should be able to testify over a target's objection apply to a third-party recordholder. The first reason, having to do with the witness's prerogatives, is discussed here. The second, which has to do with the government's interest in hearing the witness, is discussed in the next section.

It may seem incontestable that, outside of those situations where the attorney-client, spousal, or other privilege applies, one person should not be able to prevent another person from providing information to the government. But explicating why this is the case for the typical third-party witness elucidates why third-party recordholders should be treated differently. As Professor Coombs has argued, people in possession of information about others, even information that is "private" and obtained through an intimate relationship, have "an autonomy-based right to choose to cooperate with the authorities."<sup>152</sup> According to Professor Coombs, "To deny even the possibility of such a decision [to cooperate] is to turn a freely chosen relationship into a status, denying one person's full personhood to protect another's interests."<sup>153</sup> In other words, the autonomy interest of a putative witness trumps the privacy interest of a putative target when a witness decides to reveal information about the target. Thus, the target should not be able to control the witness's testimony.

That analysis only makes sense, however, when the third party is a person. Most records are held by institutions, not people. And, as *Hale* suggested a century ago when it denied corporations the privilege against self-incrimination,<sup>154</sup> institutions do not have autonomy interests. A bank, hospital, or Internet Service Provider is not denied its "personhood" when its ability to turn information over to the government is restricted. Accordingly, the analogy between third-party

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151. Cf. *State ex rel. Pollard v. Criminal Court*, 329 N.E.2d 573, 585 (1975) ("[A] witness, subpoenaed to produce his records to a grand jury . . . may not assert his fourth amendment expectation of privacy in such records;" like a witness subpoenaed to testify, he has "no right to privacy . . . and may not decline to answer on the grounds that his responses might prove embarrassing or result in an unwelcome disclosure of his personal affairs." (quoting *United States v. Calandra*, 414 U.S. 338, 353 (1974))).

152. Mary Irene Coombs, *Shared Privacy and the Fourth Amendment, or The Rights of Relationships*, 75 CAL. L. REV. 1593, 1643 (1987).

153. *Id.* at 1644.

154. *Hale v. Henkel*, 201 U.S. 43, 70 (1906) ("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.").

witnesses and third-party recordholders fails. Targets should be able to expect that information will remain with the institution unless the government demonstrates a substantial need for it.

This view of how third-party autonomy interests are relevant to Fourth Amendment analysis provides an additional explanation for why the undercover agent cases do not support *Miller's* reasoning. Many commentators have argued that both sets of decisions are wrong because we should be able to expect that the government will not turn either our social or our business relationships into investigative tools without some justification.<sup>155</sup> But even if, relying on Professor Coombs' analysis, one accepts the "social undercover agent" cases as valid law, they are distinguishable from the "institutional undercover agent" cases like *Miller* because social agents have an autonomy interest that institutional agents lack. In cases involving the latter scenario, there is no third-party interest to trump the target's interest in privacy, which should therefore be accorded greater respect than it is under current subpoena jurisprudence.

#### *E. Third Parties Are Obligated to Provide the Government with Investigative Leads*

The second reason that might be given for denying a person standing to prevent another person from testifying focuses on government rather than witness interests. The Supreme Court frequently has spoken of the obligation to give testimony to grand juries.<sup>156</sup> Certainly citizens should feel they have a duty to help government apprehend law violators. Thus, the argument here is that third-party recordholders have a duty to hand over documents that might tend to incriminate others, even over strenuous objections by those incriminated.

Again, there are descriptive and normative problems with this argument. While the Court talks about an "obligation" to provide evi-

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155. See, e.g., James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 728 (1985) (describing the logic of the "false friend" cases as "fundamentally defective and exceedingly dangerous to liberty"). I have made similar arguments, at least when the false friend is a person who has been importuned by the government to be an informant rather than, as discussed in the text, one who makes contact with the police after the legally relevant event occurs. See Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 103-06 (1991).

156. *United States v. Dionisio*, 410 U.S. 1, 9-10 (1973). See also *Blackmer v. United States*, 284 U.S. 421, 438 (1932) ("[O]ne of the duties which the citizen owes to his government is to support the administration of justice by . . . giving his testimony whenever he is properly summoned."); *Blair v. United States*, 250 U.S. 273, 281 (1919) ("The personal sacrifice [associated with giving testimony to a grand jury] is a part of the necessary contribution of the individual to the welfare of the public.").



dence, in fact most jurisdictions no longer criminalize misprision and, at least when their interlocutor is a police officer, individuals are not legally required to respond to inquiries even when the potential for self-incrimination is nonexistent.<sup>157</sup> What the Court probably intends to say when it speaks of evidentiary duties is that the individual has an obligation, enforced by the contempt power, to respond to a valid subpoena.

So the real issue is, when is a subpoena valid? My answer to that question should be apparent by now. While a relevance showing may be sufficient to support a subpoena for business documents or testimony from a third-party witness, that low standard ought to be inadequate when personal information is sought from the subject (in which case a warrant should be required or immunity granted) or from a third-party recordholder such as a bank, hospital, or Internet Service Provider. In the latter situation, one can counterpose against the recordholder's "duty to give evidence" a fiduciary "duty of allegiance," which obligates the recordholder to use information for the purpose for which it is acquired.<sup>158</sup> As discussed above,<sup>159</sup> the latter duty is consistent with current societal understandings.

Although the few courts that have addressed the issue have been reluctant to endorse such a duty of allegiance, their hesitation has come in cases where the "personal" information disclosed by the third party was not particularly private.<sup>160</sup> Whatever the appropriate result is in such cases, the duty should be much stronger where its breach involves an individual's medical, financial, and similar personal information.<sup>161</sup> That duty would not, of course, prohibit government from

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157. LAFAYETTE ET AL., *supra* note 5, at 114.

158. See SOLOVE, *supra* note 148, at 103 ("[T]he law should hold that companies collecting and using our personal information stand in a fiduciary relationship with us.").

159. See *supra* notes 107–108 and accompanying text.

160. Compare *Shibley v. Time, Inc.*, 341 N.E.2d 337 (Ohio Ct. App. 1975) (dismissing the claim that *Time's* distribution of names and addresses to a direct marketing company violated its readers' privacy), with *Weld v. CVS Pharmacy*, No. Civ. A 98-0897F 1999 WL 494114, at \*5 (Mass. Super. June 29, 1999) (denying summary judgment for CVS against claims that its use of prescription information to support a direct mail campaign violated statutory right to privacy, unfair practices law, confidentiality and fiduciary duties, and the tort of misappropriation of private personal information). Falling between these two cases is *Dwyer v. American Express Co.*, 652 N.E.2d 1351 (Ill. App. Ct. 1995) (dismissing the claim that American Express's rental of customer spending histories stated an intrusion into privacy claim but holding that American Express did violate a deceptive practice law).

161. Recognition of such a duty also is likely to be beneficial to the third party. Turning these entities into automatic agents of the government, which is the effect of current subpoena law, may betray the trust that is necessary for them to function. Thus, in an effort to avoid customer complaints about being a conduit to the government, America Online and Earthlink no longer maintain clickstream data. Conversation with Peter P. Swire, Professor of Law, The Ohio State University Moritz College of Law, Sept. 20, 2004, at Ohio State College of Law. See also Lee

obtaining personal information from third parties. But it would require that the government demonstrate some need for the information beyond the minimal relevance showing now required. Absent such a showing, the obligations of the third party should run to the subject of the records, not the state.

#### F. *Regulating Subpoenas Would Destroy Investigative Effectiveness*

The most common objection to the position just described is the one advanced originally in *Hale*: A higher standard would make government regulation impossible.<sup>162</sup> This rationale frequently appears in cases justifying administrative subpoenas issued by government agencies. In the mid-twentieth century case of *United States v. White*,<sup>163</sup> for instance, the Supreme Court stated, “The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective,” and went on to uphold a subpoena against a labor union.<sup>164</sup> Judge Selya’s dissent in *Parks v. FDIC*,<sup>165</sup> a First Circuit case which briefly recognized enhanced protection for private papers before being withdrawn, provides a modern pronouncement of the claim:

Administrative investigations differ significantly from criminal investigations: government agencies typically investigate in order to enforce compliance with complicated structures of economic regulation. The ability to obtain information from regulated parties and those persons in privity with them typically is vital to the success of the regulatory scheme [citing *United States v. Morton Salt Co.* and *Oklahoma Press*] . . . . And it is a fact of life that agencies charged with regulating economic activity often cannot articulate probable cause or even reasonable suspicion that a violation has transpired without first examining documents reflecting a party’s economic activity. . . . This incipient problem—the need to hitch the horse in

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Kovarsky, *Tolls on the Information Superhighway: Entitlement Defaults for Clickstream Data*, 89 VA. L. REV. 1037, 1069 (2003) (“A state of informational privacy where collecting agents exhibited no fidelity to user expectations would generate uncertainty that would almost certainly deter web surfing, making it more difficult for collecting agents to acquire data in the first place.”); Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1305–07 (2000) (detailing examples of businesses bowing to pressure to stop using personal data for marketing purposes and noting that “[n]one of the businesses caught misusing customer data responded by suggesting that nobody really expected her data to be private in today’s world”).

162. See *supra* text accompanying notes 37–42.

163. 322 U.S. 694, 700 (1944).

164. *Id.* at 701.

165. 65 F.3d 207 (1st Cir. 1995) (advance sheets). The opinion was later withdrawn from the Federal Reporter after a rehearing en banc was granted. See 49 ADMIN. L. REV. 519, 547 n.266 (citing *In re Gimbel*, 77 F.3d 593 (2d Cir. 1996)).

front of the cart—is frequently exacerbated because the subpoena power has great significance for most administrative agencies in the conduct of important public business.<sup>166</sup>

Although these two statements about the need to ease restrictions on agency investigations are representative, note that they both refer to cases involving organizational targets. *White*'s call for "effective" regulation is based on a perceived need to probe the "economic activities of incorporated and unincorporated organizations" and Judge Selya specifically distinguishes "administrative investigations" from "criminal investigations." In short, these decisions use the impossibility rationale only in the same subset of cases that previous discussion associated with diminished privacy concerns.

The same sort of distinction can be seen in grand jury cases, although it is less conspicuous. A constant refrain in decisions about jury subpoenas since at least 1919 is the notion that "the public has a right to every man's evidence"—the flip side of the idea that citizens have a duty to help the government.<sup>167</sup> That language suggests that the Court believes there is a strong government need for the information that grand jury subpoenas provide. Yet, consistent with the fact that grand juries historically focused on investigation of organizational, and in particular, governmental, corruption rather than individual crimes,<sup>168</sup> these cases also routinely noted that the grand jury inquiry is limited by the Fifth Amendment's prohibition on compelling a person to incriminate him or herself.<sup>169</sup> A relatively recent case illustrating this impersonal-personal dichotomy is *United States v. Dionisio*.<sup>170</sup> There, in line with previous case law, the Supreme Court baldly stated that the grand jury's right to evidence from every citizen is "necessary to the administration of justice."<sup>171</sup> But recall that *Dionisio* also carefully exempted "private books and records" from its purview.

Of course, once *Fisher* limited the reach of the Fifth Amendment, this exemption was vulnerable. As a result, the impossibility rationale has found its way into arenas outside the entity corruption context. For instance, one lower court relied on the rationale in permitting a

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166. *Parks v. FDIC*, No. 94-2262, 1995 WL 529629, at \*11 (1st Cir. Sept. 13, 1995) (Selya, J., dissenting).

167. *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (citing *United States v. Bryan*, 339 U.S. 323, 331 (1950)); *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *Blair v. United States*, 250 U.S. 273, 281 (1919).

168. See LAFAYE ET AL., *supra* note 5, at 13–14 (describing the "public watchdog" function of the grand jury during the eighteenth and nineteenth centuries).

169. See, e.g., *Branzburg*, 408 U.S. at 689–90.

170. 410 U.S. 1 (1973).

171. *Id.* at 10.

blood test on relevance grounds. Given that grand jurors must have probable cause to indict, the court stated, “it would be peculiar to require them to demonstrate the same degree of probable cause to believe that a target of their investigation committed a crime before the grand jury could properly obtain evidence in aid of their investigation.”<sup>172</sup> If applied to document subpoenas, this type of reasoning would make no distinction between organizational documents and personal ones.

That would be a mistake. First, of course, the impossibility rationale is a dangerous one *regardless* of the context, for the government can always make pleas that the Fourth Amendment and other constitutional rights make its law enforcement job difficult.<sup>173</sup> Even accepting the impossibility rationale on its face, however, it at most justifies minimal restrictions on subpoenas for business records and—at a stretch—for private financial records of individuals that must be maintained for tax purposes (assuming *Couch* is right that otherwise the tax system would not “survive”).<sup>174</sup> It does not explain why subpoenas as currently conceptualized should authorize compulsory production of personal records in connection with ordinary “criminal investigations” (to use Judge Selya’s language).

Perhaps judges are not attuned to this problem because they believe that subpoenas are seldom used for such purposes. That assumption, while probably true during much of the twentieth century, is no longer accurate. For instance, the Department of Justice (DOJ) not only relies on subpoenas to investigate antitrust violations,<sup>175</sup> government fraud,<sup>176</sup> and other organizational crimes, but also is authorized to use

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172. In the Matter of a Grand Jury Investigation, 692 N.E.2d 56, 59 (Mass. 1998).

173. Cf. *United States v. Martinez-Fuerte*, 428 U.S. 523, 575 (1976) (Brennan, J., dissenting) (“There is no principle in the jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be conveniently satisfied.”).

174. I think survival would be likely. Before *Ryan*, the Supreme Court case that rejected a probable cause requirement in the tax context, some courts had required probable cause in order to obtain tax records. See, e.g., *Lash v. Nighosian*, 273 F.2d 185 (1st Cir. 1959). In *Ryan* itself, the IRS probably had probable cause. (“The complaint alleged that on the basis of estimated net worth calculations the agent strongly suspected fraud”). The IRS usually selects tax return audits based on “mathematical formulas developed from intensive examination of returns selected at random to identify those with a high probability of error.” BORIS I. BITTKER ET AL., *FEDERAL INCOME TAXATION OF INDIVIDUALS* 47-3 (3d ed. 2002). Audits are also triggered by identification of items that do not appear allowable, complaints by former employees, former spouses and acquaintances, and conspicuous tax protests. *Id.* But assuming I am wrong about this, I would carve out a narrow exception for tax records under the “required records” doctrine. See *infra* text accompanying notes 206–211.

175. 15 U.S.C. §§ 1311–1314 (2000).

176. 5 U.S.C. App. 3, § 6(a)(4) (2000).

subpoenas to obtain records in connection with kidnapping,<sup>177</sup> child pornography,<sup>178</sup> false claims and bribery,<sup>179</sup> health care fraud,<sup>180</sup> racketeering,<sup>181</sup> and possession or sale of controlled substances.<sup>182</sup> And the DOJ is not shy about taking advantage of its authority. In 2001, it issued almost 1,900 subpoenas seeking Internet records concerning child exploitation and abuse,<sup>183</sup> and a total of 2,102 subpoenas seeking bank, medical, and other records in connection with health care offenses.<sup>184</sup> Since the attacks of September 11, 2001, government use of subpoenas directed at Internet Service Providers in attempts to identify national security threats has been particularly prolific.<sup>185</sup>

Whatever might be the case with respect to complex economic wrongdoing, the claim that these latter types of crimes are “impossible” to investigate without subpoena power is not true. In most such cases, the content of documents are secondary to other evidence obtained through interviews and interrogations, physical observation, traditional searches, and other non-documentary investigative techniques.<sup>186</sup> If, as I have argued elsewhere, subpoenas for “catalogic data” (for example, phone numbers called and purchases made) are

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177. 18 U.S.C.A. §§ 348(a)(1)(A)(i)(II), (a)(1)(c) (West Supp. 2004) (limiting access to e-mail subscriber information connected with kidnapping of children).

178. *Id.* (e-mail subscriber information only).

179. 31 U.S.C. § 3733 (2000).

180. 18 U.S.C. § 3486 (2000).

181. *Id.* § 1968.

182. 21 U.S.C. § 876(a) (2000).

183. U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE USE OF ADMINISTRATIVE SUBPOENA AUTHORITIES BY EXECUTIVE BRANCH AGENCIES AND ENTITIES 37 (2002), available at <http://www.usdoj.gov/olp/intro.pdf>.

184. *Id.* at 34–35. Information about the number of DOJ subpoenas issued in connection with false claims, bribery, racketeering, and controlled substance investigations is not available. It should also be noted that many subpoenas for medical records are in aid of investigations aimed at pharmacists or doctors for violations of controlled substances or health fraud laws. In such cases, privacy concerns may well be absent, because the information sought need not be linked to a particular patient. *Cf.* *Comm. v. Kobrin*, 479 N.E.2d 674 (1985) (holding that, in Medicaid investigations, contents of patient records were privileged, but documents detailing the number of patients seen and the frequency and length of patient visits were not).

185. Chris Jay Hoofnagle, *Big Brother's Little Helpers: How Choicepoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C. J. INT'L L. & COM. REG. 595, 621 (2004) (quoting one official of an Internet Service Provider to the effect that government requests for information have “increased fivefold” since September 11, 2001).

186. *See* BEALE ET AL., *supra* note 2, at 6-3 (noting that “ordinarily, investigations of so-called ‘street crime’ such as murder, rape, robbery, and assault can be conducted effectively without resort to the subpoena power”). Even in business investigations, this is often the case. *See, e.g.*, *United States v. Goldfine*, 538 F.2d 815, 818–19 (9th Cir. 1976) (noting that an agency carrying out an administrative inspection had developed probable cause to believe that pharmacists were violating the Comprehensive Drug Prevention and Control Act, based on reports of large shipments of controlled substances to the pharmacy, tracing of certain shipments, surveillance of the pharmacy, and the arrest of some of the pharmacy's customers).

also permitted, there is even less need for a relaxed standard for authorizing government attempts to obtain the contents of documents.<sup>187</sup> Even with respect to those individual crimes that depend on transactional proof, such as fraud, tax evasion, and computer hacking, development of individualized suspicion is generally easier than in regulatory cases, where the chain of command hides responsibility, proof can involve very complex, technical evidence, and non-documentary evidence of crime may literally be nonexistent.<sup>188</sup> The impossibility rationale, as applied to personal papers, is not based on reason, but on tradition, a tradition created in cases concerned about the efficacy of the administrative state rather than everyday law enforcement.

#### IV. SEPARATING THE PERSONAL FROM THE IMPERSONAL

The foregoing critique of current subpoena law suggests that the distinction between personal and impersonal records is a crucial one because it defines the threshold at which the relevance standard should no longer apply. Thus far not much has been said about the nature of that threshold. As it turns out, Supreme Court case law is very helpful in defining it. This assistance comes not, as one might think, from the Court's Fourth Amendment cases, but rather from its Fifth Amendment jurisprudence, which, as Part I explained, in its early incarnation tried to delineate a "zone of privacy."<sup>189</sup>

*Boyd*, the Supreme Court's initial foray into the constitutionality of subpoena law, held that even business papers fell within the privacy zone.<sup>190</sup> But *Hale* soon created the distinction that permeates this Article. As indicated earlier, the latter case denied the Fifth Amend-

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187. Slobogin, *supra* note 9, at 41 (defining catalogic data as "information that classifies and describes a transaction, as distinguished from the content of the transaction").

188. Compare this recent summary of the problems associated with corporate investigation to investigation of "ordinary" crime:

Despite the seemingly broad liability made possible by respondeat superior, it is notoriously difficult to prosecute corporations for violations of specific intent crimes. First, corporate crime is highly concealable, typically because victims are unaware of their injury. Even when crime is revealed, it is challenging to identify within an organization a particular guilty actor.

Stacey Neumann Vu, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459, 467-68 (2004) (footnotes omitted). See also FRANCIS CULLEN ET AL., *CORPORATE CRIME UNDER ATTACK* 350 (1987) (stating that "the labyrinthian structure of many modern corporations often makes it extremely difficult to pinpoint individual responsibility for specific decisions").

189. *Griswold v. Connecticut*, 38 U.S. 479, 484 (1965). See also *supra* notes 56-65 and accompanying text.

190. *Boyd v. United States*, 116 U.S. 616, 631-32 (1886) (stating that "any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers,

ment right to corporations on the ground that a corporation is “a creature of the state,” in contrast to the individual citizen, who “owes no duty to the state . . . to divulge his business.”<sup>191</sup> *Hale* was the first in a series of cases that laid out the so-called “collective entity” exception to the scope of the Fifth Amendment privilege.<sup>192</sup> In effect, the Court used this exception to delineate the difference between personal and impersonal papers.

By the time of *Fisher*, which changed the focus of the Fifth Amendment from privacy to coercion and thus marginalized the exception,<sup>193</sup> the Court had expanded the collective entity doctrine to encompass far more than compulsion of documents that incriminate a corporation (the situation in *Hale*). For instance, five years after *Hale*, in *Wilson v. United States*,<sup>194</sup> the Court found that a corporate officer’s refusal to produce subpoenaed corporate records was not protected by the privilege even when their production might also incriminate him, because the records were not “personal;”<sup>195</sup> rather they were “subject to examination by the demanding authority” and their custodian thereby had “accepted the incident obligation to permit inspection.”<sup>196</sup> Some three decades after *Wilson*, in *United States v. White*,<sup>197</sup> the Court held that labor unions were also “collective entities,” because a union has “a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only.”<sup>198</sup>

Thirty years after that, and two years before *Fisher*, the Court narrowed the “zone of privacy” even further by refusing, in *Bellis v. United States*,<sup>199</sup> to permit a small law firm to assert the privilege. Although the firm was a partnership that “embodie[d] little more than the personal legal practice of the individual partners,”<sup>200</sup> it was a “formal institutional arrangement organized for the continuing conduct of

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to convict him of crime, or to forfeit his property, is contrary to the principles of a free government”).

191. *Hale v. Henkel*, 201 U.S. 43, 74–75 (1906).

192. See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 392 (4th ed. 2000) (discussing the collective entity doctrine).

193. See *supra* text accompanying notes 79–84.

194. 221 U.S. 361 (1911).

195. *Id.* at 378.

196. *Id.* at 382.

197. 322 U.S. 694 (1944).

198. *Id.* at 702.

199. 417 U.S. 85 (1974).

200. *Id.* at 95.

the firm's legal practice,"<sup>201</sup> and thus was "an independent entity apart from its individual members."<sup>202</sup> Although decided after *Fisher*, *United States v. Doe*<sup>203</sup> continued in the spirit of *Bellis* by holding that even a sole proprietor's records are not protected by the Fifth Amendment (unless, per *Fisher*, the act of production provides the government with proof of its case), thus dealing the final blow to the *Boyd* doctrine as applied to businesses.<sup>204</sup> Lower courts have also recognized an analogous "government records exception" that governs subpoenas for records describing the operations of a government agency.<sup>205</sup>

During the same period it was developing the collective entity doctrine, the Court was sketching out the contours of a "required records" exception to the Fifth Amendment, in connection with subpoenas for records of *individuals*. In *Shapiro v. United States*,<sup>206</sup> decided in 1948, the Court held that the Fifth Amendment did not bar a subpoena directing an individual to produce commodity sales records that the Emergency Price Control Act required him to maintain.<sup>207</sup> Although the Court recognized that the government should not be able to vitiate the privilege simply by requiring that an individual keep and surrender written records, it concluded that in this case there was "a sufficient relation between the activity sought to be regulated and the public concern."<sup>208</sup>

More persuasively, in the later case of *Grosso v. United States*,<sup>209</sup> the Court stated that the required records exception applied only when the government's purpose was "essentially regulatory," the information sought was of the type "customarily kept" by the individual, and the records "have assumed 'public aspects' which render them at least analogous to public documents."<sup>210</sup> These criteria, it has been said, validate any subpoena for "essentially public documents such as routine income tax forms" and for documents held by "persons engaged in highly regulated industries [that] are required to be main-

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201. *Id.* at 94.

202. *Id.* at 92.

203. 465 U.S. 605 (1984).

204. Currently, the most heavily litigated issue in this context is whether an employee's personal writings, such as pocket calendars, are corporate records. See, e.g., *United States v. Stone*, 976 F.2d 909 (4th Cir. 1992).

205. *In re Sealed Case*, 950 F.2d 736 (D.C. Cir. 1991).

206. 335 U.S. 1 (1948).

207. *Id.*

208. *Id.* at 32.

209. 390 U.S. 62 (1968).

210. *Id.* at 67-68.



tained as a part of a regulatory scheme.”<sup>211</sup> In other words, documents of individuals are subject to subpoena under the required records doctrine when, as in the collective entity cases, their attributes of privacy are minimal.

The collective entity and required records exceptions come from cases construing the Fifth Amendment. But they resonate with Fourth Amendment concerns.<sup>212</sup> Thus, to the extent they adhere to the parameters described above, they may provide a satisfactory benchmark for determining when subpoenas may be based solely on relevance and when they should be based on something more.

## V. CONCLUSION

Document subpoenas are a standard criminal investigative tool today. But until relatively recently these subpoenas could not be used to obtain records from a person who could show that they would incriminate that individual personally and that they were neither entity documents or “essentially” public documents required to be kept for regulatory purposes. Although said to be mandated by the Fifth Amendment’s prohibition of compelled testimony, this showing depended on the extent to which the records were personal and private. At the same time, the Fourth Amendment, ostensibly the linchpin of constitutional privacy protection, was pushed into the background and thus provided minimal protection against document subpoenas, whether addressed to third parties or to the target of an investigation, and whether aimed at organizational or personal records. It is entirely possible that the early twentieth century Court allowed Fourth Amendment limitation on subpoenas to wither because it assumed that personal records would always be well protected by the Fifth Amendment.

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211. BEALE ET AL., *supra* note 2, at 6-112. Even medical records might be “required,” when they are sought for the purpose of monitoring medical practice. See, e.g., *In re Kenney*, 715 F.2d 51, 53 (2d Cir. 1983) (involving patients’ x-rays and medical records).

212. Indeed, the required records exception’s emphasis on pervasive regulation parallels the Supreme Court’s administrative search jurisprudence, which allows searches of “pervasively regulated” businesses on less than probable cause. See, e.g., *United States v. Biswell*, 406 U.S. 311, 316 (1972) (“When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.”). Of course, privacy is not the only concern in these cases. See, e.g., Robert Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 67 (1987) (suggesting that the key question in required records cases is “whether a particular reporting requirement is designed to facilitate the government’s legitimate needs for regulatory information rather than undercut the adversary system by covertly aiding the investigation and prosecution of crime”). But, to a significant extent, the collective entity and required records exceptions overlap with Fourth Amendment concerns.

Today, however, the Fifth Amendment's restrictions on subpoenas for documents are substantially reduced, while Fourth Amendment restrictions remain trivial. This Article has argued that this minimalist regulatory regime is unjustifiable from a privacy perspective. At least where personal (as opposed to organizational) documents are involved, the privacy concerns evinced in earlier Fifth Amendment jurisprudence should be rejuvenated under the aegis of the Fourth Amendment, not—as was initially true under the Fifth Amendment—as an *absolute* bar to *every* document subpoena in criminal cases, but rather as a protection against demands based on mere “official curiosity.” Further, this stronger suspicion requirement for obtaining personal data should apply to third party as well as first-party subpoenas; the privacy interest in personal information that, to an ever increasing extent, *must* be transferred to third parties in order to function in today's world is not diminished simply by the fact of transfer or by the government's avowed need for the information. In short, the Fourth Amendment should be interpreted to demand that all “papers” that contain personal information—whether held by the subject or by a third-party institution—be afforded protection similar to that extended to the individual's house, person, and effects.<sup>213</sup>

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213. The precise contours of this protection for papers are explored in more detail in Slobogin, *supra* note 9.

