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Compelled Consent: An Oxymoron with Sinister Consequences for Citizens Who Patronize Foreign Banking Institutions

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I. INTRODUCTION

This Article analyzes an increasingly sensitive issue in federal criminal procedure: the use of "compelled consents" to produce foreign banking and professional relationship records.[1] The context in which the issue arises is best illustrated by a well-known decision in this area, *United States v. Ghidoni*:[2]

> Ghidoni [was indicted on] four counts of willful tax evasion, in violation of 26 U.S.C. section 7206(1). The indictment alleged that Ghidoni, . . . [had] engaged in a scheme whereby income . . . was diverted to . . . [a] [b]ank . . . in the Cayman Islands. The allegedly diverted income was not reported on . . . tax returns for those years. . . . Ghidoni maintain[ed] that [he did not] . . . control any

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[1] *See, e.g., 1st Circuit Rejects "Compelled Consent"*, Nat'l L.J., Apr. 20, 1987, at 9, col. 1; *Secord Says Access to Bank Records Violates Constitution*, Washington News/UPI, Apr. 7, 1987 (available on NEXIS); *Hiding Money Gets Tougher*, Nat'l L.J., Nov. 3, 1986, at 1, col. 1; *Bank-Record Disclosure Ordered*, Nat'l L. J. Sept. 22, 1986, at 8, col. 1; *Foreign Banks Don't Have to Turn Over Records*, Wash. Fin. Rep. (BNA)—Legal Briefs, (May 27, 1985), at 926.

[2] 732 F.2d 814 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984). *See also infra* pt. III(B)(1).

> Cayman Island bank accounts and that distributions to him from accounts there were loans from former clients.
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> In furtherance of its investigation, the government issued a subpoena to the Miami, Florida, branch of the [b]ank . . . commanding production of bank records relating to Ghidoni's accounts. . . . [B]ank officials expressed concern that production of these records would subject bank employees to criminal liability under the Confidential Relationships (Preservation) Law of the Cayman Islands. The bank suggested that problems with the Cayman Island law could be avoided if Ghidoni would execute a directive consenting to disclosure.[3]
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> . . . .
>
> . . . Ghidoni refused [to execute the consent directive], arguing that compelled execution of the directive would violate his right against self-incrimination. The district court rejected the claim and found Ghidoni in contempt.[4]

Other courts have disagreed, holding that the execution of consent directives, or "compelled consents," violates the fifth amendment prohibition against compulsory self-incrimination.[5]

This Article explores the dissonance which characterizes the case law in this area and presents a functional analysis of the incriminatory aspects of "compelled consents." This apparent dissonance can be resolved and a general principle is available for implementing fifth amendment guarantees in extraterritorial discovery.

Part II describes several foreign bank secrecy statutes and examines the considerations that have provided the occasion for the development and implementation of compelled consents. Part III traces the evolution of these consents and analyzes the decisional law that has tempered their use. Part IV considers the argument that such consents violate constitutional guarantees against self-incrimination; a proposal reconciles the apparently inconsistent positions that certain federal courts have taken with

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[3] *Ghidoni*, 732 F.2d at 816 (footnote omitted).

> One of the tactics frequently used by law enforcement agencies of the [U.S.] government for obtaining information held by banks in other countries where bank secrecy laws exist is the "consent directive." A consent directive is a statement signed by a party under investigation pursuant to a court order that purports to grant consent to the disclosure of financial information to government officials.

INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE 319 (V. Nanda & M. Bassiouni eds. 1986) [hereinafter INTERNATIONAL CRIMINAL LAW]. *See also infra* pt. II(B) (for a further discussion of the Cayman Islands statute which was at issue in *Ghidoni*).

[4] 732 F.2d at 816 (The Eleventh Circuit affirmed the contempt citation.). *See infra* pt. III(B).

[5] *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . *nor shall [he] be compelled in any criminal case to be a witness against himself*. . . ." (emphasis added)). *See, e.g.*, Senate Select Committee v. Secord, 664 F. Supp. 562 (1987). *See also infra* pt. IV(B) (for a more thorough discussion of this matter).

respect to this issue. Finally, Part V presents a brief conclusion summarizing the points which have been presented in preceding sections.

II. "INFORMATION HAVENS:" THE RATIONALE FOR THE DEVELOPMENT AND IMPLEMENTATION OF "COMPELLED CONSENTS"

> [M]any foreign nations have enacted legislation that prohibits the production of documents from their jurisdictions for any proceeding in a foreign nation. Since these statutes commonly attach a criminal penalty to violations, American Courts are confronted with the possibility that enforcement of their discovery orders will lead to criminal liability for the producing company.[6]

Although the above-quoted passage describes issues that arise in the context of *civil* discovery, its description is equally pertinent to *criminal* discovery. In recent years, the U.S. government has encountered extreme difficulties in securing the production of documents,[7] the examina-

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[6] Note, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841 (1986) (footnotes omitted) [hereinafter Note, *Strict Enforcement*].

> Increased interaction among citizens of different countries has resulted in the growing need to obtain information from other countries. Over the last few years, the United States has increasingly sought to recover information held in other countries regarding criminal matters by the use of subpoenas. Subpoenas issued by [U.S.] courts and government agencies have often met with resistance in foreign countries, particularly in countries that have bank secrecy or blocking statutes.

INTERNATIONAL CRIMINAL LAW, *supra* note 3, at 301.

[7] *See* C. BLAU, A. RUDNICK, R. MARKLEY, J. MARRERO, J. JARVEY & H. GREENWALD, INVESTIGATION AND PROSECUTION OF ILLEGAL MONEY LAUNDERING: A GUIDE TO THE BANK SECRECY ACT 4 (1983) [hereinafter BLAU & RUDNICK].

> Banks located in . . . so-called "secrecy jurisdictions" cannot disclose any information found in their customers' bank accounts. Because unauthorized disclosures of information in their customers' accounts may subject these banks to criminal liability abroad, foreign banks usually have not assisted [U.S.] law enforcement agencies in their investigations of criminals and tax and regulatory violators who use secret foreign accounts to facilitate illegal activity or hide ill-gotten profits.

Id. The text continues with following observations:

> During the late 1960s, the [U.S.] government became increasingly concerned about the use of secret bank accounts by Americans engaged in illegal activity. Reports revealed that these bank accounts were frequently used to:
> (1) evade capital gains tax on securities transactions;
> (2) manipulate United States securities markets;
> (3) violate rules on insider trading;
> (4) trade in gold;
> (5) act as a depository for money obtained from illegal activity; and
> (6) bring money from illegal sources back into the United States as clean money loans.
>
> The foreign bank secrecy laws soon were recognized as a major impediment to the prevention and detection of these illegal activities. This fact became more evident as attempts by the U.S. government to prosecute tax and security regulation violators who utilized foreign bank accounts were increasingly hampered. The prosecution of drug

tion of which is deemed essential for the course and conduct of various criminal investigations.[8]

The primary difficulty has involved attempts to gain access to foreign banking records.[9] Lawmakers and law enforcement personnel have concluded that the intransignece of foreign banking institutions has proximately contributed to the growth and prosperity of various types of criminal activity.[10] "The effect has been to systematically obstruct U.S.

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traffickers and other criminals who used foreign accounts to hide or launder their ill-gotten gains also were frustrated by foreign secrecy laws.

Id. at 4-5 (footnotes omitted) (citing S. REP. No. 1139, 91st Cong., 2d Sess. 3-6 (1970).

[8] *See, e.g., Hearings on International Tax Administration Before the Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Committee on Government Operations*, 100th Cong., 1st Sess. (1987) (statement of Michael C. Durney, Acting Assistant Attorney General, Tax Division, Department of Justice) [hereinafter *Durney Statement*]; Olsen, *Discovery in Federal Criminal Investigations*, 16 N.Y.U. J. INT'L L. & POL. 999 (1984); *Crime and Secrecy: The Use of Offshore Banks and Companies*, S. REP. No. 99-130, 99th Cong., 1st Sess. (1985) [hereinafter SENATE REPORT]; BLAU & RUDNICK, *supra* note 7.

[9] *See* SENATE REPORT, *supra* note 8, at 1.

> In 1982, the Permanent Subcommittee on Investigations (PSI) began examining the criminal exploitation of offshore tax havens, through the use of banks, trusts and companies. The subcommittee's review encompassed the full range of criminal activities, from those commonly associated with drug trafficking and commodities fraud, to the more unexpected use of offshore facilities by American tax protestors.
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> The subcommittee found that the criminal exploitation of offshore havens is flourishing because of haven secrecy and foreign government intransigence in the face of overwhelming evidence of dirty money in their banking systems.

Id. Even more frightening is this later report.

> A 1983 Joint Economic Committee report estimating that the U.S. "underground economy" was then hiding $222 billion a year in taxable income from the Internal Revenue Service (IRS), which amounted to 7.5% of our gross national product. The Senate Permanent Subcommittee on Investigations has reported that other estimates of this income concealment range from $150 billion to $600 billion a year. In 1983, the Research Division of the Internal Revenue Service reported that the 'tax gap' (taxes owed minus taxes received) grew from $30.9 billion in 1973 to $90.5 billion in 1981. The Dorgan Task Force very recently reported that the tax gap grew to $103 billion for 1986, and estimated it will grow to $200 billion by 1992. All research to date on the tax gap clearly indicates that a great deal of the problem results from [U.S.] taxpayers' use of offshore financial facilities. . . .
>
> By using offshore contrivances, tax evaders capitalize on jurisdictional problems encountered by federal tax authorities in attempting to obtain evidence in foreign countries or retrieving foreign-based assets to satisfy tax obligations.

Durney Statement, *supra* note 8, at 1-2 (footnotes omitted) (citing SENATE REPORT, *supra* note 8, at 1-2 and *The Dorgan Task Force on Narrowing the $100 Billion Tax Gap* (a report by Congressman Byron L. Dorgan and the Dorgan Task Force (May 1987)), *reprinted in* 133 CONG. REC. S5,924 (daily ed. May 5, 1987).

[10] SENATE REPORT, *supra* note 8, at 1. A subsequent passage provides some details as to the nature of the problems generated by the banking laws of these "secrecy jurisdictions":

> Senator Roth opened the subcommittee's hearings on the criminal uses of offshore banks and companies by noting:
>
> What we (PSI) have found . . . is a problem that is pervasive and growing. . . .
>
> During this investigation and others which the subcommittee has conducted we have

law enforcement investigations, erode the public's confidence in our criminal justice system, and thwart the collection of massive amounts of tax revenues."[11]

These concerns have resulted in the development and implementation of "compelled consents." Because this phenomenon cannot be fully understood without appreciating these concerns and the forces which produced them, the succeeding portions of this section (a) examine the banking laws of "secrecy jurisdictions"; (b) analyze the doctrines that govern the resolution of controversies which arise with respect to "transnational discovery"; (c) consider the decisional law generated by efforts to obtain extraterritorial discovery without the benefit of "compelled consents"; and (d) describe the considerations which led to the development of such consents.

A. "Secrecy Jurisdictions"

The "secrecy jurisdictions" are more commonly referred to as "tax havens" or "information havens."[12] A "tax haven" has been defined as " 'any country having a low or zero rate of tax on all or certain categories of income, and offering a certain amount of banking or commercial secrecy.' "[13] "Information havens" are "jurisdictions whose laws are intentionally structured so as to attract commerce based on a promise of secrecy."[14]

Havens generally possess three essential characteristics:

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repeatedly heard testimony about major narcotic traffickers and other criminals who use offshore institutions to launder their ill-gotten profits or to hide them from the Internal Revenue Service. Haven secrecy laws in an ever increasing number of cases prevent U.S. law enforcement officials from obtaining the evidence they need to convict U.S. criminals and recover illegal funds. It would appear that use of offshore haven secrecy laws is the glue that holds many U.S. criminal operations together.

But equally shocking is the fact that we have also found that offshore havens are no longer used exclusively by criminals. Instead, they are increasingly being used by otherwise law abiding Americans to avoid paying taxes and to shield assets from creditors.

Id. at 4 (footnotes omitted).

[11] *Id.* at 1.

[12] *See, e.g.*, SENATE REPORT, *supra* note 8, at 29-36.

[13] *Id.* at 29 (quoting Gordon, *Tax Havens and Their Use by United States Taxpayers—An Overview* (Internal Revenue Service, Jan. 12, 1981)). "Internal Revenue Service Commissioner Roscoe L. Egger, Jr. elaborated on Gordon's definition by adding '[m]ost tax havens also possess modern communication systems, a general lack of currency controls, an aggressive policy of self-promotion, and no extensive involvement in tax treaties.' " *Id. See also id.* at 33 ("[s]trictly in utilitarian terms, a tax haven can be defined as any jurisdiction which provides accessible facilities, together with an infrastructure, and sociopolitical milieu, that are more lucrative (because of secrecy and tax breaks) than those available in financial communities of other jurisdictions").

[14] Note, *Strict Enforcement, supra* note 6, at 848 n.32. ("The obvious parallel is to 'tax havens' whose attraction is in their provision of tax laws that enable companies to avoid tax liability in other places.").

(1) favorable tax structures, (2) secrecy concerning business transactions, and (3) economic sector domination by banks and financial institutions.[15] Havens "compete[ ] economically by attracting foreign investment to utilize [their] banking facilities and to form offshore companies. . . . [T]hrough law and practice, [they]. . . protect the investments and the investors from harm or loss inflicted by any foreign country of which these investors are residents or citizens, or in which they are economically active."[16]

The laws which havens utilize in this regard

> fall into two categories: secrecy and blocking provisions. Secrecy laws usually involve general confidentiality. They prohibit the disclosure of business records or the identity of bank customers to a third party. Blocking laws, on the other hand, are very specific in nature. They prohibit the disclosure, copying, inspection or removal of documents located in the territory of the enacting State in compliance with the production orders of a foreign authority.[17]

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[15] SENATE REPORT, *supra* note 8, at 29-30.

> A favorable tax structure is an indispensable feature of a tax haven. . . . Because of these differing attitudes toward income taxes, most haven jurisdictions do not recognize tax evasion as a crime and refuse to assist in any investigation of a U.S. citizen suspected of evasion, even though laundering income through the haven may have been the primary means of evasion.
>
> The second requirement . . . secrecy, refers to the confidentiality given to persons transacting business—especially with banks. Bank secrecy has important underpinnings in British common law and has been adopted by virtually all present or former British colonies. Some countries have strengthened and broadened the common law by enacting statutes with the tax haven trade in mind, the unfortunate result of which has been to render vital information virtually impossible for foreign government investigators to obtain. . . .
>
> A third common characteristic of tax havens is that banks and similar financial institutions assume a dominant role in the havens' trade and commerce, and those skilled in financial transactions, such as bankers, lawyers, and accountants constitute a large percentage of the haven's professional class.

[16] *Id.* at 33.

[17] *Id.* at 43. *See also* Note, *Strict Enforcement*, *supra* note 6, at 847-48; RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 437 reporters' note 1 (Tent. Final Draft No. 2, 1985) [hereinafter RESTATEMENT OF FOREIGN RELATIONS LAW (REVISED)]. Rather than rely upon the distinction between "secrecy" and "blocking" laws, one author has divided blocking laws into three categories: (1) "older laws like the Swiss banking secrecy statutes" which were not originally enacted in order to block discovery in connection with American litigation, but which are being used to that effect; (2) "broad discovery preclusion statutes" that "create blanket protection for large categories of documents and/vest relatively broad discretion over disclosure issues in some government official"; and (3) laws "such as Canada's Uranium Information Security Regulations [which are] aimed directly at frustrating specific American claims" for discovery. Note, *Strict Enforcement*, *supra* note 6, at 847-48. *See also* United States v. Vetco, Inc., 644 F.2d 1324, 1324 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981); SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 111 (S.D. N.Y. 1981); Comment, *Sovereignty, Jurisdiction and Reasonableness: A Reply to A.V. Lowe*, 75 AM. J. INT'L L. 629, 631-36 (1981); Prov. Can. Stat. 1976-2368, CAN. STAT. O. & REGS. 77-836 (Oct. 13, 1977), *in implementation of* Atomic Energy Act, 1979, sched. 9, R.S.C. ch. A-19 [hereinafter Prov. Can. Stat.].

As of 1985, "there [were] more than 15 jurisdictions with secrecy laws and 16 jurisdictions with blocking laws."[18] Although secrecy and blocking laws often achieve identical ends, they tend to derive from rather different considerations, as is illustrated by the discussion immediately below.

1. Blocking Laws

Blocking laws result from a "conflict between U.S. legal and enforcement policies and the policies promoted by the non-disclosure jurisdictions."[19] Principally, these blocking jurisdictions disfavor the broad scope of American pretrial discovery practices.[20]

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[18] SENATE REPORT, *supra* note 8, at 43. *See also* RESTATEMENT OF FOREIGN RELATIONS LAW (REVISED), *supra* note 17.

[19] SENATE REPORT, *supra* note 8, at 44.

[20] *See* 28 U.S.C. section 26(b)(1)(1983); SENATE REPORT, *supra* note 8, at 44.

> [T]he most important underlying cause of this conflict [has been] a difference in pretrial discovery practices.
>
> American pretrial discovery rules are far more liberal than their foreign counterparts. Under U.S. law, a court is permitted to order the production of documents that are inadmissible at a trial as long as the documents sought appear 'reasonably calculated to lead to the discovery of admissible evidence.' Most common-law and civil law jurisdictions condemn such pretrial investigations as 'fishing expeditions,' permitting only the production of evidence that would be admissible at trial and allowing for the disclosure of evidence sought by letters rogatory for criminal matters only after 'commencement' of the proceedings, which has come to mean the issuance of an indictment. . . . [T]he legislative history of many of the foreign blocking laws indicates [that] they were enacted in response to problems allegedly encountered . . . as a result of U.S. litigation.

S. SEIDEL, EXTRATERRITORIAL DISCOVERY IN INTERNATIONAL LITIGATION 24 (1984) ("[I]n most common law countries, even England, one must often look hard to find the resemblances between pretrial discovery there and pretrial discovery in the [United States]. In England, for example, although document discovery is available, depositions do not exist, interrogatories have strictly limited use, and discovery of third parties is not generally allowed."). The "difference[s] in pretrial discovery practices" are the result of very distinct conceptualizations of the nature and function of discovery:

> Two fundamentally divergent notions of judicial process rest at the heart of the conflict between the American pretrial discovery process and foreign law. In civil law countries like France, for instance, the investigatory process of discovery occurs exclusively under the aegis of the judge. The French reject the suggestion that such a critical function of the court be entrusted to the parties themselves. Even the British, with a common law system similar to that of the United States, object to the unequalled breadth of American discovery practice.

Note, *Strict Enforcement*, *supra* note 6, at 846 (footnotes omitted) (citing J. MERRYMAN, THE CIVIL TRADITION 11-14 (1985); REPORT MADE IN THE NAME OF THE COMMISSION OF PRODUCTION AND EXCHANGES (1) ON THE LAW PROJECT ADOPTED BY THE SENATE RELATING TO THE COMMUNICATION OF DOCUMENTS AND INFORMATION OF ECONOMIC, COMMERCIAL OR TECHNICAL NATURE TO FOREIGN PHYSICAL PERSONS OR COMPANIES, NO. 1814, at 11-15 (1980); Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 35, 36 (1979); Collins, *Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States*, 13 INT'L LAW. 27 (1979)). *See also*

France and England are among the jurisdictions that have enacted blocking legislation. The French statute renders it illegal for any French national to disclose economic or national security information to foreigners. The law requires any French national, approached with a request for such information, to inform the French government of the request.[21] "The legislative history of the blocking statute discloses that the law was clearly designed as an effort to preclude pretrial discovery of French nationals involved as parties in American litigation."[22] The English legislation "followed the enactment of the French act by only months."[23] This statute allows for the "blocking" of all foreign pretrial discovery.[24]

Report of the United States Delegation to Eleventh Session of the Hague Conference on Private International Law, 8 I.L.M. 785, 806 (1969).

[21] SENATE REPORT, *supra* note 8, at 45-47 (citing Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-resident Parties to American Litigation*, 17 INT'L LAW. 61 (1980) (footnote omitted)).

> On July 16, 1980, the French blocking statute . . . was enacted. The statute contains four sections. The first declares it unlawful . . . for a French national to disclose to a foreign entity any information which might impair France's sovereignty, security, or its "basic economic interests." Article 1(a) declares it unlawful for anyone . . . to seek disclosure . . . other than through means prescribed by French law. Article 2 requires any person within the scope of [a]rticle 1 and 1(a) to notify the "competent" French minister of any request for information. . . . Finally, [a]rticle 3 purports to impose criminal sanctions which would apply to a violation of the legislation.

Id. Article 3 provides that "[w]ithout prejudice to more serious penalties provided by law, any violations of article 1 and 1(a) of this law shall be punishable by two to six months' imprisonment and a fine of from 10,000 to 120,000 francs ($2,500 to $30,000) or either one of these two penalties alone." *Id.* at 46-47 n.74. *See also* C. PEN art. 1A, no. 80-538 (Fr.) ("Subject to treaties or international agreements . . . it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.").

With respect to the legislative history of the blocking statute, "Report No. 1814 of the French National Assembly dated June 19, 1980 . . . explains . . . [that] the blocking statute . . . is premised on the French perception of the 'abuse' inherent in all pretrial discovery in American courts. The report is candid in its articulation of the purpose of the blocking statute to immunize French corporations from the need to comply with discovery obligations in American courts." SENATE REPORT, *supra* note 8, at 47 (citing Batista, *supra* note 21). *Cf.* Toms, *The French Response to Extraterritorial Application of United States Antitrust Laws*, 15 INT'L LAW. 585 (1981).

> [T]he legislative history of [the French statute] shows only that [it] was adopted to protect French interests from abusive foreign discovery procedures and excessive assertions of extraterritorial jurisdiction. Nowhere is there an indication that [it] was to impede litigation preparations by French companies, either for their own defense or to institute lawsuits abroad to protect their interests, and arguably such applications were unintended.

Id. at 598.

[22] SENATE REPORT, *supra* note 8, at 45-47 (citing Batista, *supra* note 21 at 64-5).

[23] Toms, *supra* note 21, at 598.

[24] SENATE REPORT, *supra* note 8, at 46-47 (citing Batista, *supra* note 21, at 69-70). This statute

> grants the British Secretary of State the ability to prohibit persons or corporations in the United Kingdom from furnishing commercial information or producing commercial docu-

The French and English statutes illustrate the type of legislation which many jurisdictions have enacted "[i]n order both to thwart the extraterritorial assertion of U.S. substantive law and to foil the discovery"[25] attendant thereupon. It is this specific focus which distinguishes "blocking laws" from "secrecy laws."

2. Secrecy Laws

The Swiss bank secrecy laws are the archetype of this variety of nondisclosure provision. Enacted during the 1930s "in response to actions by the German Nazi government [which was] seeking to acquire the assets of fleeing or holocaust-annihilated Jews," these laws antedate the relatively recent expansion in American civil and criminal discovery.[26]

> Swiss banking secrecy is defined in the Swiss civil code as part of each individual's right to privacy, and in each contract between the bank and the bank customer. Enacted in 1934, SBA article 47 prohibits the disclosure of customer transactions, and of bank communications with its customers and others regarding those transactions. Sanctions are applicable to those individuals who infringe upon these secrecy rights directly, or induce or try to induce others to break the confidence, and to those who violate the act through negligence. Switzerland is an example of a country in which a violation of banking secrecy is a criminal as well as civil offense.[27]

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ments for use in a foreign country. . . . The power to preclude compliance with U.S. discovery orders or requests is so expansive that the Secretary of State can overrule compliance with any pretrial device solely on the grounds that it is a 'pretrial disclosure' device. *Id.*

25 Note, *Strict Enforcement*, *supra* note 6, at 847. *See* Prov. Can. Stat. 1976-2368 (the Canadian non-disclosure law "authorizes jail terms of up to five years and fines of up to $5,000" for a violation of its provisions.).

The enactment of blocking legislation was prompted by "the explosive application of American substantive law abroad with a concomitant expansion in the use of American procedural rules," which followed closely upon the Supreme Court's decision in Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197 (1958). *See supra* pt. II (B).

26 SENATE REPORT, *supra* note 8, at 33. *See also* Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, 14 NEW ENG. L. REV. 18 (1978).

27 SENATE REPORT, *supra* note 8, at 47-48 (footnotes omitted). *See also* Meyer, *supra* note 26; Note, *The Effect of the U.S.-Swiss Agreement on Swiss Banking Secrecy and Insider Trading*, 15 L. & POL'Y INT'L BUS. 565 (1983).

> Switzerland's bank secrecy laws are founded primarily in private law. In Switzerland, public law preempts private law. Thus, secrecy cannot be asserted where public law requires disclosure of particular information. Under Swiss law, two circumstances may relieve a bank of its obligation to preserve customer confidences: (1) customer's voluntary consent to disclose; and (2) a directive by competent Swiss authorities (such as court order) to disclose Swiss private law give the bank customers, and not the bank, control of the banking secret. Thus, the bank customer, subject to certain exceptions, may voluntarily waive his banking secrecy protections and direct the bank to disclose any information regarding his account to the government or any other third parties.

Recently, the once-impregnable Swiss bank secrecy has been attenuated by several international conventions, including the 1977 U.S.-Swiss Treaty on Mutual Assistance in Criminal Matters; the Memorandum of Understanding that was executed by the same two countries; and the Law on International Mutual Legal Assistance on Criminal Matters which these two nations executed in 1983.[28] Unfortunately for American law enforcement personnel, attenuation of Swiss banking secrecy has apparently resulted in an increase in banking secrecy elsewhere.[29]

Probably the most notorious of these *nouveau* "secrecy jurisdic-

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SENATE REPORT, *supra* note 8, at 48 (footnotes omitted).

[28] *See* SENATE REPORT, *supra* note 8. *See also* Note, *The Effect of the US-Swiss Agreement on Swiss Bank Secrecy on Insider Trading*, *supra* note 27; de Capitani, *International Legal Assistance in Criminal Matters*, 88 CREDIT SUISSE BULL. 18 (1982).

The Memorandum of Understanding "essentially confirms and supplements the U.S.-Swiss Treaty of 1977" and through its Convention, "effectively guarantee[s] Swiss cooperation in SEC investigations despite the absence of criminal sanctions in Switzerland." SENATE REPORT, *supra* note 8, at 48. In 1984, "Convention XVI . . . was terminated by the enactment of a Swiss penal code concerning the 'misuse of material non-public information,' " the result being "[c]ustomers placing orders on the U.S. stockmarket are now automatically required to waive their secrecy rights, and insider trading is considered to be a criminal offense under Swiss law." *Id.* at 49.

> The 1977 Treaty on Mutual Assistance in Criminal Matters required that
> two criteria . . . be met before the Swiss would justify the compulsory production of requested information: (1) dual criminality; and (2) either the alleged offense had to be included in the schedule attached to the treaty or the allegations in the request had to be of such importance as to justify compulsory measures.

Id.

> "The MAA does not insist upon the fulfillment of these criteria to achieve disclosure," but it does require that mutual assistance proceedings comport with the "pertinent court procedures of the Swiss canton in which they take place." *Id.* Since "[i]n two cantons in particular, persons subject to bank secrecy laws, such as bankers, may refuse to testify as witnesses or to hand over bank documents to the State authorities," this means that discovery may become problematic even under the provisions of the MAA.

Id.

[29] The Grand Duchy of Luxembourg is the perfect example of this phenomenon:

> As U.S. regulators probe deeper and deeper behind the veil of secrecy surrounding Swiss banking, money has begun pouring out of Switzerland into the banks of the nearby Grand Duchy. Though the torrent has hitherto gone largely unnoticed, foreigners' deposits in Luxembourg banks jumped nearly 40% last year, to an estimated $160 billion.
>
> That puts the Grand Duchy neck and neck with Switzerland and within reach of what statistics suggest is the largest money haven in the world, the Cayman Islands, with roughly $200 billion in deposits. . . .
>
> The Grand Duchy is going to great lengths to facilitate the banking influx. . . .
>
> Thus, in 1981 and again in 1984, Luxembourg's Parliament actually strengthened bank secrecy laws, mandating jail sentences for anyone making unauthorized disclosures about secret bank accounts. Explains Foreign Affairs and Economy Minister Jacques Poos, "We discovered that our tight secrecy could be sold all over Europe and all over the world."

Finn & Pouschine, *Luxembourg: Color it Green*, FORBES, Apr. 20, 1987, at 22. *See generally* SENATE REPORT, *supra* note 8, at 92-95 (describing the growth of Luxembourg's banking industry).

tions" is the Cayman Islands:[30] The Caymans became a colony of the United Kingdom in 1959, and bank secrecy was initiated seven years later.[31] The new law imposed criminal sanctions for the "disclosure of bank information or a lack of confidentiality concerning banking matters."[32]

In 1976, the Caymans "tightened their secrecy laws by passing the Confidential Relationships (Preservation) Act, thereby transforming the bank secrecy law into a sweeping business secrecy law."[33] This Act "was designed to . . . render the 'misuse of confidential information . . . a criminal offense if committed in the islands and even if committed outside the islands in relation to Caymanian subject matter.' "[34]

Because the new Act suffered from at least two "major flaws,"[35] it was amended in 1979 in order "to further clarify and strengthen [its pro-

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[30] SENATE REPORT, *supra* note 8, at 50.

A vivid example of the rapid growth of tax haven banks and trust companies is offered by the Cayman Islands. In 1964, the Caymans had only one or two banks and virtually no offshore (non-resident) business. . . . [I]n late 1981, the island had about 30 multinational full service "Type A" commercial banks and more than 300 "Type B" brass plate banks, which are allowed to conduct only offshore business. By 1983 Cayman was said to have 425 banks. Moreover, the number of offshore companies has jumped from about 15,000 in 1981 to 36,000 in 1985. Yet, the population of the Cayman Islands is only 17,000.

Id. at 30-31.

[31] *Id.* at 77.

[32] (1) Except for the purpose of the performance of his duties or the exercise of his functions under this law or when lawfully required to do so by any court of competent jurisdiction within the islands or under the provisions of any law of the islands, no person shall disclose any information relating to any application of any person under the provisions of this law or to the affairs of a licensee which he has acquired in the performance of his duties or the exercise of his functions under this law.

(2) Whoever contravenes subsection (1) is guilty of an offense and liable on summary conviction to a fine not exceeding $2,000 or to a term of imprisonment not exceeding 1 year or both.

Id. (quoting the Banking and Trust Law 1966 § 10). The enactment of this measure brought the Caymans into the British common law tradition by which "a banker [is obligated] to treat his customers' financial affairs as confidential." *Id.* at 33. *See also* Tournier v. Nat'l Provincial and Union Bank of Eng., 1 K.B. 461, 486 (1924) (banker may disclose banking information concerning a customer where the banker is compelled by law to make such a disclosure).

[33] SENATE REPORT, *supra* note 8, at 50. The 1976 act was "a direct result of the Miami Federal District Court's holding in *United States v. Field* which was unfavorable to the Caymans." *Id.* at 77. In the *Field* case, "A grand jury subpoenaed a Cayman banker while he was in the U.S. and . . . held him in contempt when he claimed both the Fifth Amendment and Cayman Bank Secrecy law, and refused to testify." *Id.* at 50; *see also* In re Grand Jury Proceedings, 532 F.2d 404, 404 (5th Cir.), *cert. denied*, 429 U.S. 940, 940 (1976).

[34] SENATE REPORT, *supra* note 8, at 51 (PSI Staff Stud. 17).

[35] *Id.* at 79.

[The Act's] broad wording could have led Caymanian courts to void parts of it as being too vague. Furthermore, the law was deemed to have "no application" to "any professional person acting in the normal course of business."

The latter proposition was considered a source of great difficulty, as "the extremely broad definition of 'professional persons' and 'normal course of business' might possibly have been construed

visions] by specifically prohibiting the disclosure of all confidential information with respect to business of a professional nature which arises in or is brought into the islands."[36]

The amended Act "is extraterritorial . . . and thus applies to any U.S. law enforcement agents who attempt to obtain confidential information."[37] Banks or bank employees who are approached for the disclosure of such information must "notify their Attorney General and 'apply for directions' from the Grand Court" of the Cayman Islands.[38] Unless the Court grants such an application,[39] disclosure is a criminal offense punishable "on summary conviction [by] a fine not exceeding $5,000 or . . . imprisonment for a term not exceeding 2 years or both."[40]

The Act provides that these penalties can be doubled (a) whenever an individual improperly discloses, or improperly attempts to disclose, confidential information and then "receives or solicits on behalf of himself or another any reward for so doing," and/or (b) whenever "a professional person, entrusted as such with confidential information" either improperly discloses, or improperly attempts to disclose, such information.[41] It also provides that "a Bank which gives a credit reference in respect of a customer without first receiving the authorization of that customer is guilty of [a criminal offense]."[42]

The secrecy configuration that is achieved by the provisions of the Caymans' Confidential Relationships (Preservation) Act is functionally indistinguishable from the configuration that prevails under the laws of

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to exonerate a banker, lawyer, or accountant who impart[ed] information solely to government officials under compulsion." *Id.* at 79 (quoting M. LANGER, PRACTICAL TAX PLANNING (1979)).

[36] *Id.* at 51. Section 3.(1) of the Act provides that "[t]his law has application to all confidential information with respect to business of a professional nature which arises in or is brought into the islands and to all persons coming into possession of such information *at any time thereafter whether they be within the jurisdiction or therout [sic].*" (emphasis added). Confidential Relationships (Preservation) Act, § 3.(1) (Cayman Islands 1979) [hereinafter Confidential Act], *reprinted in* SENATE REPORT, *supra* note 8, at 79.

[37] SENATE REPORT, *supra* note 8, at 30, 51.

[38] *Id* at 79. Confidential information is defined as "information concerning any property which the recipient thereof is not, otherwise than in the normal course of business, authorized by the principal to divulge." Confidential Act, § 3A, *reprinted in* SENATE REPORT, *supra* note 8, at 79. The "Act extended the coverage of those prohibited from divulging information to bank employees, solicitors, government officials, and 'every kind of commercial agent' and 'every person subordinate to or in the employ or control of such person for the purpose of his professional activities.'" *Id.* at 79.

[39] The court can direct "(a) that the evidence be given; or (b) that the evidence shall not be given; or (c) that the evidence shall be given subject to conditions which [it] may specify whereby the confidentiality of the information is safeguarded." Confidential Act, § 3A.(3)(a)-(c), *reprinted in* SENATE REPORT, *supra* note 8, at 79.

[40] *Id.* § 4.(1)(b). An attempt at disclosure can also result in the imposition of the sanctions described above. *Id.* § 4.(1)(a)(ii).

[41] *Id.* § 4.(2) & (4).

[42] *Id.* § 4.(5).

such "haven" jurisdictions as the Bahamas,[43] Panama,[44] Luxembourg,[45] Barbados,[46] Antigua,[47] and Singapore.[48] Each "shares the conviction

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[43] "Preservation of secrecy is widely held by the government, attorneys, and bankers to be absolutely critical to the continued success and growth of the Bahamas as a major international financial center." SENATE REPORT, *supra* note 8, at 67. Bahamian statutes establish a blanket-type secrecy law which prohibits the disclosure of bank customer information without customer consent or judicial or executive approval. One of the drafters of the current law stated that the intent was to allow disclosure only after a court proceeding. However, there are no tax treaties, mutual assistance treaties, [or] other cooperation agreements with the U.S., and Bahamian courts may easily find no basis for ordering compliance. *Id.* at 52. *See* Banks and Trust Companies Regulation (Amendment) Act, No. 3, § 10(1) (Bah. 1980); Banks Amendment Act, No. 65, § 19(1) (Bah. 1965). Individuals who make disclosures that fall within the prohibitions of this Act commit a criminal offense and are "liable on summary conviction to a fine not exceeding fifteen thousand dollars or to a term of imprisonment not exceeding two years or to both such fine and imprisonment." Banks and Trust Companies Regulation (Amendment) Act, No. 3 § 10(3) (Bah. 1980). *See* Barclay's Bank Int'l, Ltd. v. McKinney, No. 474 (Bah. S. Ct. Feb. 16, 1979); *infra* pt. II (C).

[44] Under Panamanian Law, [f]ines can be imposed for disclosing information obtained from commercial documents to foreign authorities, the investigation of the private affairs of a client of a bank is forbidden, and the disclosure of information regarding the identity of a principal of a numbered bank account is against the law except in cases of criminal proceedings. SENATE REPORT, *supra* note 8, at 102 (footnotes omitted) (citing the Commercial Code of Pan., arts. 88-89; Cabinet Decree No. 238 (Pan. July 2, 1970); Law No. 18 (Pan. Jan. 28, 1959)). *See generally id.* at 101-08 (describing the growth of Panama's offshore banking industry).

[45] Finn & Pouschine, *supra* note 29, at 22. *See generally* SENATE REPORT, *supra* note 8, at 92-95 (describing the growth of Luxembourg's bank secrecy laws).

> Physicians, surgeons, . . . and all other persons to whom, by reason of their position or profession, secrets have been confided, and who reveal such secrets in cases other than those in which they are called to testify in court and in those in which the law compels their disclosure, shall be punishable by imprisonment from eight days to six months and a fine from 100 to 500 francs.

Lux. Penal Code, art. 488, *reprinted in* SENATE REPORT, *supra* note 8, at 94. *See also* Law on Credit Institutions, art. 16 (Lux.) (providing an exception to art. 488 of the Penal Code that bankers may reveal account information to certain parties, i.e. persons listed on the account), *reprinted in* SENATE REPORT, *supra* note 8, at 95.

[46] *See generally* SENATE REPORT, *supra* note 8, at 70-74 (describing the growth of Barbados bank secrecy laws). Banking in Barbados is governed by the provisions of the Offshore Banking Act (1979-26).

The provisions of the Offshore Banking Act which impose secrecy are sections 47 and 55. Section 47 states that "information concerning the identity of a depositor, settler or beneficiary of a trust, or concerning the assets, liabilities, transactions or other information in respect of a depositor, settler or beneficiary of a trust" acquired by "a director, officer, employee or auditor of the licenses" or "an employee of the Central Bank shall not [be disclosed] to any person except [under the limited circumstances provided] under subsection (2)."

Id. at 72 (quoting the Offshore Banking Act). Section 55 provides that "[a]n examiner may not have access to . . . the name of any settler or beneficiary of a trust, if the deposit agreement or instrument creating the trust . . . has directed that it be kept secret and the depositor, settler or beneficiary is not a resident of Barbados." *Id.*

[47] On December 31, 1982, Antigua enacted the International Business Corporations Act (Law No. 28 of 1982) which . . . provides for the establishment of international banks and captive insurance companies. . . .

Secrecy provisions of the act are very stringent and similar to those of the Caymans and Baha-

. . . that, without secrecy, [its] financial section will collapse."[49] Each of the havens, therefore, jealously guards the identities and secrets of its depositors.

B. *Comity, Balancing and Good Faith: Extraterritorial Discovery in Federal Criminal Investigations*

> It is a mistake to condemn bank secrecy *per se* because it is being abused in some countries and jurisdictions. Persons and companies transacting business with banks are entitled to a reasonable degree of privacy in connection with their business transactions. The United States itself, through the Right to Financial Privacy Act of 1978, recognizes this right. *The critical question is not whether a country has*

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mas. There are criminal penalties of up to U.S.$18,850 and a prison term not exceeding 1 year for inquiries or disclosures concerning the business affairs of a bank or a transaction with a bank. *Id.* at 56-57. *See generally id.* at 55-58 (describing bank secrecy in Antigua). Section 244 of the Antiguan statute provides, in pertinent part, that:

> (1) . . . no person shall disclose any information relating to the business affairs of [a] customer that he has acquired as an officer, employee, agent, auditor, solicitor of the banking corporation, or otherwise in the performance of his duties . . . except in the performance of his duties . . . pursuant to an order of a court . . . in Antigua and Barbuda . . . .
>
> (4) Nothing in this act impairs the [bank's duty] to protect the confidentiality of the business affairs of its customers.

Antiguan Int'l Bus. Corp. Act, No. 28, § 244 (1982), *reprinted in* SENATE REPORT, *supra* note 8, at 57. The statement contained in § 244(4) of the act is a reiteration of the traditional British common law position regarding the obligations of a banker to his depositors. *See, e.g., supra* note 32.

[48] *See generally* SENATE REPORT, *supra* note 8, at 113-18 (describing bank secrecy in Singapore). Bank secrecy in Singapore was established by the Banking Act of 1970, § 42-(2) which provided as follows:

> (2) No official of any bank and no person who by reason of his capacity or office has any means access to the records of the bank registers or any correspondence of material with regard to the account of any individual customer of that bank shall give, divulge or reveal any information whatsoever regarding the moneys or other relevant particulars of the account of such customer to—
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> (a) any person who, or any bank, corporation or body of persons which, is not resident of Singapore; or
>
> (b) any foreign government or organization, unless—
>
> (i) the customer or his personal representatives gives or give his or their permission so to do;
>
> (ii) the customer is declared bankrupt; or
>
> (iii) the information is required to assess the credit worthiness of the customer in connection with or relating to bona fide commercial transaction or a prospective commercial transaction.

Banking Act of 1970, § 42-(2) (Singapore), *reprinted in* SENATE REPORT, *supra* note 8, at 115. The Act was amended as of Apr. 22, 1983: "The amended version grants even more privacy than the previous one." *Id.* at 116. For a discussion of other "haven" jurisdictions, see generally id. at 53-5 (Anguilla); 74-6 (Bermuda); 84-9 (H.K.); 89-92 (Liechtenstein); 95-98 (Montserrat); 98-101 (Netherlands Antilles); 108-13 (St. Vincent and the Grenadines); 118-25 (S. Pacific); 128-34 (Turks and Caicos Islands).

[49] SENATE REPORT, *supra* note 8, at 67.

bank secrecy laws, but whether a country has built into its laws effective and efficient means of piercing bank secrecy where there is reasonable suspicion that a bank has been used in connection with a crime or as the depository of the proceeds of a crime.[50]

As part II(A) of this Article illustrates, "haven" jurisdictions believe that their livelihood depends upon their ability to maintain the confidences of those who patronize their banking institutions; because of that belief, they have made every effort to eliminate *any* "effective and efficient means of piercing [their] bank secrecy." Because these efforts have been remarkably successful, federal law enforcement personnel often find that it is impossible to pursue an investigation by traditional means, such as serving a subpoena upon the individual or entity who is in possession of the documents.[51]

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[50] Olsen, *supra* note 8, at 1008-09 (footnotes omitted and emphasis added); Right to Financial Privacy Act, 12 U.S.C. § 3401 (1982).

> [M]any states have adopted secrecy and blocking statutes specifically to protect violations of their sovereignty by overly aggressive United States investigators. . . . Although [there is a tendency] to identify such reactive statutes as "second class law," or, worse, . . . imply[ing] bad faith on the part of the foreign country, foreign governments do not share this opinion. Many of these laws contain specific language noting that the legislation is necessary to protect security or essential economic interests, to protect the freedom of commercial shipping activity, to protect trading interests, or to prevent activity that adversely affects foreign trade.

2 TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS 1329, 1331-32, 1355, 1363-64 (1984), *reprinted in* INTERNATIONAL CRIMINAL LAW, *supra* note 3, 261-62 (footnotes omitted). One treatise notes:

> [i]n the short term, the [U.S.] [G]overnment must . . . determine when its insistence on obtaining foreign evidence at all costs is worth the potential diplomatic problems that may ensue. Third-party witnesses caught in a conflict between the laws of two countries are certain to become increasingly annoyed at their untenable position and may lobby foreign governments for even stronger blocking and bank secrecy laws that already exist.

INTERNATIONAL CRIMINAL LAW, *supra* note 3, at 265.

[51] *See, e.g.*, Olsen, *supra* note 8, at 1008-11.

> [T]he two most common situations in which United States subpoenas seek evidence located in other countries [are]: (1) when neutral intermediaries, such as banks or attorneys, possess the evidence of clients that is sought by the subpoena and (2) when the entity that holds the evidence is located outside the United States but has a business relationship with an entity in the United States, such as a parent or a subsidiary.

INTERNATIONAL CRIMINAL LAW, *supra* note 3, at 302-03. *See supra* pts. II, III.

> From the point of view of [U.S.] law enforcement officials, subpoenas are a legitimate and direct means of obtaining information. However, many foreign governments consider [U.S.] subpoenas issued to persons outside the United States as intrusive and an infringement on their sovereignty. These governments argue that there are less intrusive means of obtaining information. For example, letters rogatory are a diplomatic means of obtaining evidence between countries and there are sometimes treaty provisions that deal with the same purpose. [U.S.] law enforcement officials contend, however, that these alternative means of obtaining information are time consuming and often fail to produce results.

INTERNATIONAL CRIMINAL LAW, *supra* note 3, at 301-02. The subpoenas that are at issue in extraterritorial discovery are either grand jury subpoenas or subpoenas issued by an administrative agency

"Despite the existence of [these] non-disclosure laws, U.S. courts are still technically permitted to compel the production of documents under the conflict of laws principal [sic] *lex fori*—the law of the forum governs procedural matters."[52] But the availability of "laws which penalize producers if they disclose . . . documents for use in foreign litigation"[53] can

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such as the Securities Exchange Commission. *See id.* at 303-05. For a discussion of the issues that can arise in this context, see Note, *Extraterritorial Jurisdiction of U.S. Courts Regarding the Use of Subpoenas Duces Tecum to Obtain Discovery in Transnational Litigation: The Search for a Limiting Principle*, 16 N.Y.U. J. INT'L L. & POL. 1135 (1984); Note, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COLUM. L. REV. 1320 (1983); Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 FORDHAM L. REV. 877 (1982).

[52] SENATE REPORT, *supra* note 8, at 44. "It is an established principle of conflict of laws that the procedural law of the forum state applies to litigation in that state." RESTATEMENT OF FOREIGN RELATIONS LAW (REVISED), *supra* note 17, §§ 122, 127 and 127 comment a.

> Failure to comply with an order to produce [documents, objects or other] information may subject the person to whom the order is directed to sanctions, including [a] finding of contempt, dismissal of a claim or defense, or default judgment, or may lead to a determination by the court that the facts to which the order was addressed are as asserted by the opposing party.

Id. § 437(1)(b). In the litigation of criminal investigatory and liability issues, the primary sanction for failing to comply with an order to produce is a contempt citation. *See, e.g.*, United States v. Ghidoni, 732 F.2d at 815. *See supra* notes 2-3 and accompanying text.

[53] Note, *Strict Enforcement*, *supra* note 6, at 844. Ironically, it was a decision of the U.S. Supreme Court that provided the impetus for the development of such laws: In Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958),

> a Swiss holding company was suing for the return of property seized by the Alien Property Custodian during World War II. The district court dismissed plaintiff's complaint as a sanction for its refusal to comply with the Court's order to produce bank records, despite a finding that the Swiss government had constructively seized the documents and that plaintiff had shown good faith efforts to comply with the production order.

S.E.C. v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 114 (S.D.N.Y. 1981) (footnote omitted). *See also Societe Internationale Industrielles*, 357 U.S. at 201-02. The Supreme Court reversed, holding that "where plaintiff was prohibited by Swiss law from complying with the discovery order and there was no showing of bad faith, the sanction of dismissal . . . was not justified." *Banca Della Svizzera Italiana*, 92 F.R.D. at 114. *See also Societe Internationale Industrielles*, 357 U.S. at 208-12. In the course of rendering its holding, the Court noted that "fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign." *Id.* at 211. It was this observation that "encouraged the proliferation of foreign nonproduction legislation by permitting the inference that American courts will not compel discovery if production will subject a party to criminal sanctions abroad." Note, *Strict Enforcement*, *supra* note 6, at 846. *See also Banca Della Svizzera Italiana*, 92 F.R.D. at 111 (disclosure ordered where Swiss corporation acted in bad faith by making deliberate use of Swiss non-disclosure law); Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962) (subpoena duces tecum modified on a showing that compliance would violate Panamanian law); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960) (subpoena modified to avoid production of documents protected under Canadian law); First Nat'l Bank of New York v. IRS, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960) (production would not be ordered to the extent that it would violate Panamanian law).

Recently, in Societe Nationale Industrielle Aerospatiale v. United States, 107 S. Ct. 2542 (1987), the Supreme Court returned to this issue. The *Societe Nationale Industrielle Aerospatiale*

result in the *de facto* emasculation of this principle.[54]

The viability of the principle is a function of the standards that regulate production even though it contravenes the law of the nation which is the situs of the information that is to be produced. This part describes the standards that are utilized in this regard, while part II(C) of this Article examines the decisional law that has arisen with respect to their implementation.

"In the past, the courts have used three standards to evaluate nonproduction: comity, balancing, and good faith."[55]

> 'Comity' . . . is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[56]

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decision involved an issue which is not directly pertinent to the matters under consideration in this Article, i.e., whether the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 " 'provides the exclusive and mandatory procedures for obtaining documents and information located within the territory of a foreign signatory.' " *Societe Nationale Industrielle Aerospatiale*, 107 S. Ct. at 2548 (quoting *In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 124 (8th Cir. 1986)). The Court rejected the argument that the Convention supersedes the Federal Rules of Civil Procedure so as to become "the exclusive means for obtaining evidence located abroad," and held that "the Hague Convention [does] not deprive . . . District Court[s] of the jurisdiction [they] otherwise possess[ ] to order a foreign national party . . . to produce evidence physically located within a signatory nation." *Societe Nationale Industrielle Aerospatiale*, 107 S. Ct. at 2553 (footnote omitted). The Court also held, however, that "American courts, in supervising pretrial proceedings, [a] should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. . . . [and] [b] should . . . take care to demonstrate due respect for any special problem confronted by the foreign litigant . . . and for any sovereign interest expressed by a foreign state." *Id.* at 2557. The Court did "not articulate specific rules to guide this delicate task of adjudication." *Id.*

54 "U.S. courts have had difficulty acquiring information, because some jurisdictions consider American production orders to be an infringement on their sovereignty. A few countries have even filed diplomatic protests with the U.S. State Department over U.S. discovery requests." SENATE REPORT, *supra* note 8, at 44-45.

55 Note, *Strict Enforcement*, *supra* note 6, at 853. *See* SENATE REPORT, *supra* note 8, at 44-46. *See* Comment, *Fear of Foreign Prosecution and the Fifth Amendment*, 58 IOWA L. REV. 1304 (1973) (for further information).

56 Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). *See also Societe Nationale Industrielle Aerospatiale*, 107 S. Ct. at 2555 n.27; Emory v. Grenough, 3 U.S. (3 Dall.) 368, 370 n.1 (1797); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS section 38 (M. Bigelow 8th ed. 1883). In *Societe Nationale Industrielle Aerospatiale* the Court was required to consider the effects of the French "blocking statute" upon a discovery request which was served pursuant to litigation that was pending in the U.S. District Court for the Southern District of Iowa. *See Societe Nationale Industrielle Aerospatiale*, 107 S. Ct. at 2546. The Court offered the following comments on this issue:

> It is well-settled that such ["blocking"] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute. . . . It is clear that American courts are not required to adhere blindly to the directives of such a statute. . . . The lesson of comity is

After the U.S. Supreme Court issued its holding in *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*,[57] "three Second Circuit cases articulated the 'pure comity' approach to [transnational discovery]."[58] This approach was discarded after it became apparent that it represented little more than passive acquiescence in the refusal to comply with discovery requests.[59]

The new approach was a "balancing" test which was predicated upon certain provisions of the Restatement (Second) of Foreign Relations Law of the United States.[60] Section 39(1) of the Restatement provides that "[a] state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct."[61]

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that neither the discovery order nor the blocking statute can have the same omnipresent effect that it would have in a world of only one sovereign. The blocking statute thus is relevant . . . only to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material.

Id. at 2556 n.29 (citation omitted).

57 357 U.S. 197 (1958).

58 Note, *Strict Enforcement*, *supra* note 6, at 854 (footnote omitted) (the three cases were *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962) (subpoena duces tecum modified on a showing that compliance would violate Panamanian law); *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960) (subpoena modified to avoid production of documents protected under Canadian law); and *First Nat'l Bank of New York v. IRS*, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960) (production would not be ordered to the extent that it would violate Panamanian law).

59 In [these] cases, the courts merely deferred to foreign nondisclosure laws by refusing even to issue discovery orders. Such deference does not adequately address the need to foster American substantive law, the potential for expansion of nondisclosure jurisdictions, or the injustice of depriving the requesting party of discovery.

The courts rejected the Second Circuit approach when it became clear that such deference would not address those other important interests. The analysis of the comity standard is still relevant, however, since the importance of friendly relations abroad remains a central factor in most decisions in this area.

Note, *Strict Enforcement*, *supra* note 6 at 854-55 (footnotes omitted). *See also* United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968); Minpeco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517 (S.D.N.Y. 1987); SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 114 (S.D.N.Y. 1981).

60 *See, e.g.*, *First Nat'l City Bank*, 396 F.2d at 897; *Minpeco, S.A.*, 116 F.R.D. at 517; *Banca Della Svizzera Italiana*, 92 F.R.D. at 114.

61 RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 39(1) (1965) [hereinafter RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW]. *See Minpeco, S.A.*, 116 F.R.D. at 517. The reference to "jurisdiction" encompasses both subject matter and personal jurisdiction. *See, e.g.*, Olsen, *supra* note 8, at 1019-22; *Banca Della Svizzera Italiana*, 92 F.R.D. at 114 (subject matter jurisdiction under sections 21(3) and 27 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78u(e) and 78a(a). *See also In re* Sealed Case, No. 87-5256, slip op. (cited in 56 U.S.L.W. 2283 (D.C. Cir., Nov. 6, 1987)) ("if the government shows that there is a reasonable probability that ultimately it will succeed in establishing the facts necessary for the exercise of [personal] jurisdiction [in a particular matter], compliance with a grand jury [ ] subpoena may be di-

Section 40 of the Restatement lists the factors that are to be used in determining whether such an exercise is appropriate:

> Where two States have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each State is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction in the light of such factors as: (a) vital national interests of each of the States; (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person; (c) the extent to which the required conduct is to take place in the territory of the other State; (d) the nationality of the person; and (e) the extent which enforcement by action of either State could reasonably be expected to achieve compliance with the rule prescribed by that State.[62]

Two of the most common rationales for refusing to comply with U.S. discovery requests are predicated on the provisions of section 40: "(1) disclosure by the foreign party will violate the law of its own country and may be accompanied by criminal sanctions, and (2) foreign governments have a strong commercial interest in protecting their domestic corporations from the expense and hazards of defending American litigation."[63]

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rected") (quoting Marc Rich & Co. v. United States, 707 F.2d 663, 670 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983)).

For the proposition that "the [f]ifth [a]mendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained from compelling self-incrimination," see United States v. (under seal), 794 F.2d 920, 925-28 (4th Cir. 1986) (because the fifth amendment "would not prohibit the use of compelled incriminating testimony in a Philippine court, it afford[ed] an immunized witness no privilege not to testify before a federal grand jury on the ground that this testimony [would] incriminate him under Philippine law"). *See also* Zicarelli v. Investigation Commission, 406 U.S. 472 (1972); Note, *The Reach of the Fifth Amendment Privilege When Domestically Compelled Testimony May Be Used in a Foreign Country's Court*, 69 VA. L. REV. 875 (1983).

62 RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, *supra* note 61, § 40. *See also* INTERNATIONAL CRIMINAL LAW, *supra* note 3, at 257-77.

63 Batista, *supra* note 21, at 80. Interestingly enough, in a separate opinion in *Societe Nationale Industrielle Aerospatiale*, Justice Blackmun offered the following observation as to the importance of protecting American interests from the hazards of foreign discovery:

> Our Government's interests. . .are far more complicated than can be represented by the limited parties before a court. The United States is increasingly concerned, for example, with protecting sensitive technology for both economic and military reasons. It may not serve the country's long-term interest to establish precedents that could allow foreign courts to compel production of the records of American corporations.

Societe Nationale Industrielle Aerospatiale, 107 S. Ct. 2542, 2560 n.3 (Blackmun, J., concurring in part and dissenting in part).

The first of the above-described defenses is grounded in a frequently-overlooked concept known as the "act of state" doctrine. *See, e.g.*, Note, *Strict Enforcement*, *supra* note 6, at 850 n.38. "The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own

In adjudicating the merits of these contentions, American courts presently rely upon a modified version[64] of the "balancing" test. This approach emphasizes the vital national interests of the states involved and the hardships of compliance and further adds considerations to the Restatement test.[65] Under the modified test "the principal factors to consider . . . are (1) the competing interests of the nations whose laws are in conflict, (2) the hardship of compliance on the party or witness from whom discovery is sought, (3) the importance to the litigation of the information and documents requests, and (4) the good faith of the party requesting discovery."[66]

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territory." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964); *see also* Underhill v. Hernandez, 168 U.S. 250, 252 (1897). Only two decisions have considered the application of the "act of state" doctrine to the problem of transnational discovery. *See infra* pt. II(C).

[64] *See infra*, notes 65-66 and accompanying text (for the elements of this modified text).

> This modified version of the "balancing" test was developed as it became apparent that various of the factors listed in § 40 are of minimal or no utility in the adjudication of claims advanced by non-disclosing parties under the protection of foreign "blocking" and/or "secrecy" laws.

See generally Note, *Strict Enforcement*, *supra* note 6, at 856-70; *Minpeco, S.A.* 116 F.R.D. at 522-23 (for a discussion of the development of this text).

[65] *Minipeco, S.A.*, 116 F.R.D. at 522-23.

> Courts . . . have characterized the first two factors—the competing interests of the countries involved and the hardship imposed by compliance—as far more important . . . than the last three. . . .
>
> At least two other factors have been found to be significant in addition to those [listed in section 40 of the Restatement]. The first is the importance of the information and documents requested to the conduct of the litigation. . . .
>
> The second . . . is the good or bad faith of the party resisting discovery. . . . Courts have considered a resisting party's good faith efforts to comply with discovery . . . [and] whether a party's inability to produce documents as a result of foreign law prohibitions was fostered by its own conduct prior to the commencement of the litigation.

Id. See also SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981); Compagnie Française D'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16 (S.D.N.Y. 1984); United States v. Vetco Inc., 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35 (2d Cir. 1972); United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968); *In re* Uranium Antitrust Litig., 480 F. Supp. 1138 (N.D. Ill. 1979). *See also* Batista, *supra* note 21, at 82 ("[a]nother very compelling rebuttal . . . applies . . . where the non-disclosing defendant itself, bears responsibility for the enactment of the concealment legislation).

> Three basic types of bad faith can count against a nondisclosing party. The first is the secreting of documents in a jurisdiction where they cannot be produced legally. . . . Second, the collusion of a company with a foreign government by seeking the implementation of blocking legislation indicates a deliberate intent to contravene American discovery practice. Third, the absence of any affirmative efforts to comply with a discovery order by seeking waiver of foreign law objections also indicates bad faith.

Note, *Strict Enforcement*, *supra* note 6, at 871 (footnote omitted); *see also* Note, *Extraterritorial Discovery: An Analysis Based on Good Faith*, *supra* note 51, at 1320 (1983).

[66] *Minipeco, S.A.*, 116 F.R.D. at 523. *See also* Olsen, *supra* note 8, at 1022-24; Note *Strict Enforcement*, *supra* note 6, at 856-73. The modified balancing test also reflects the influence of the

C. *Decisions Applying the Restatement Balancing Test*

The two most significant applications of the balancing test have affected the Bank of Nova Scotia. In the first,[67] the Bank appealed a civil contempt citation[68] issued subsequent to the Bank's refusal to comply with a pretrial subpoena duces tecum issued by a federal grand jury which concerned information supposedly in the Bank's Bahamian branch.[69]

The government moved to compel production.[70] In response, the Bank "presented an affidavit showing that compliance with the subpoena could expose [it] to prosecution under the Bahamian bank secrecy

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tentative draft of the RESTATEMENT (REVISED) FOREIGN RELATIONS LAW, *supra* note 17, § 437(1)(c), which provides that

> [i]n issuing an order directing production of information located abroad, a court in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the extent to which compliance with the request would undermine important interests of the state where the information is located; and the possibility of alternative means of securing the information.

"The Tentative Draft recommends [a] balancing approach for the decision of whether to order production and then applies the good faith standard to the question of whether sanctions should be used to enforce the order." Note, *Strict Enforcement*, *supra* note 6, at 865 (footnote omitted). For an evaluation of the approach contained in § 437(1)(c), see *id.* at 866-70. *See also* United States v. Toyota Motor Corp., 569 F. Supp. 1158, 1162 (C.D. Cal. 1983) (applying the approach contained in § 437(1)(c)).

In assessing good faith, it is important to consider the nature and purpose of the statute which impedes compliance with a discovery request: "[S]tatutes that frustrate [the] goal [of adjudication by United States courts] need not be given the same deference by courts of the United States as substantive rules of law at variance with the law of the United States." *See supra* note 17; INTERNATIONAL CRIMINAL LAW, *supra* note 3, at 261 (footnote omitted). " '[I]t seems that U.S. courts view the interests of states that are "secrecy havens" with less respect than the interests of states where underlying economic activity is centered,' " which suggests that "the good faith burden is heavier in those states that adopt these practices." INTERNATIONAL CRIMINAL LAW, *supra* note 3, at 261 n. 109 (quoting RESTATEMENT (REVISED) FOREIGN RELATIONS LAW, *supra* note 17, § 437, reporter's note 8).

67 United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983) [hereinafter Nova Scotia I]. *See also infra* note 105 and accompanying text.

68 *Nova Scotia I*, 691 F.2d at 1385.

69 *Id.* at 1386.

> The Bank . . . is a Canadian chartered bank with branches . . . in forty-five countries, including . . . the Bahamas. A federal grand jury conducting a tax and narcotics investigation issued a subpoena duces tecum to the Bank calling for the production of certain records maintained at the Bank's main branch or any of its branch offices in Nassau, Bahamas and Antigua, Lesser Antilles, relating to the bank accounts of a customer of the Bank. . . . The Bank declined to produce the documents, asserting that compliance with the subpoena without the customer's consent or an order of the Bahamian courts would violate Bahamian bank secrecy laws.

Id. (footnotes omitted). *See supra* note 43 (for the provisions of the Bahamian secrecy law).

70 *Nova Scotia I*, 691 F.2d at 1386.

law."[71] The district court did not find this circumstance compelling and granted the government's motion.[72] "[T]he Bank's Miami agent [then] appeared before the grand jury and formally declined to produce the documents called for by the subpoena."[73] The district court held the Bank in contempt for failing to obey its original order, after which the Bank appealed to the Fifth Circuit.[74]

On appeal, the Bank argued that the district court improperly analyzed [the] case under the balancing test of section 40 of the Restatement adopted in *United States v. Field*.[75] In *Field*, a Cayman bank officer was served with a subpoena issued by a grand jury investigating tax evasion.[76] He refused to answer questions concerning his activities with the bank's clientele, asserting that to do so would violate Cayman secrecy laws.[77] The government did not disagree,[78] but "[u]pon stipulation that [he] would continue to refuse to answer the questions before the grand jury,

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[71] *Id.* at 1387.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.* at 1389 (citing United States v. Field, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976)).

Actually this was the third argument which the bank presented. The first two arguments were (a) "that there were insufficient grounds to enforce the subpoena . . . [and (b)] that enforcing the subpoena would violate due process." *Id.* at 1385. The first argument was an attempt to persuade the Eleventh Circuit to "require the government to show that the documents sought [were] relevant to an investigation properly within the grand jury's jurisdiction and not sought primarily for another purpose." *Id.* at 1387. The appellate court rejected this argument as "impos[ing] undue restrictions upon the grand jury investigative process. . . ." *Id.*

The second argument was that "compliance . . . would require [the Bank] to violate the Bahamian bank secrecy law . . . therefore . . . violat[ing] due process under *Societe Internationale Power Participations Industriells v. Rogers*." *Id.* at 1388 (citation omitted). The Bank contended "that it [was] a disinterested custodian of the documents" and that "it is fundamentally unfair to require a 'mere stakeholder' to incur criminal liability in the Bahamas." *Id.* The Eleventh Circuit rejected the argument (a) because "[t]he district court found [that] the Bank had not made a good faith effort to comply with the subpoena", and (b) because "the Bank [was] not being denied a constitutionally required forum to recover confiscated assets," as had been the plaintiff in *Societe Internationale*. *Id.* *See also supra* note 53 and accompanying text.

[76] *United States vs. Field*, 532 F.2d 404, 405 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

[77] *Id.* (footnotes omitted). "He submitted an affidavit by an expert on Cayman law that stated that Field could be subject to criminal punishment for answering the questions before the grand jury." *Id.* at 406. The affidavit also stated that "the bank examiner of the Cayman Islands could require Field to" reveal whether he had testified before the grand jury. *Id.* "If Field refused to answer the questions of the bank examiner, he was subject to a criminal penalty of up to six months imprisonment." *Id.*

Field also predicated his refusal to answer on the proposition that "he would incriminate himself in violation of his [f]ifth [a]mendment rights." *Id.* at 405. He "was granted immunity and ordered to resume his testimony," but "still refused to answer the questions." *Id.*

[78] *Id.* at 406 (Field also pointed out that by "testifying before the grand jury [he] would subject himself to criminal prosecution in the Cayman Islands, his place of employment and residence.").

Moreover, after entering this order, the district court made the following comments:

the district court held him in civil contempt. . . ."[79]

On appeal the Fifth Circuit rejected his argument that "as a matter of international comity [it] should refuse to enforce the subpoena."[80] Field contended that "nations should make every effort to avoid the situation . . . where one nation requires an act that the other nation makes illegal."[81] In rejecting this contention, the appellate court began "with the proposition that the fact that the district court's order [would] subject Field to criminal prosecution in his country of residence does not of itself prohibit enforcement of the subpoena."[82]

The court then applied the balancing test prescribed by section 40 of the Restatement, contrasting the need of the United States to thwart violation of its tax laws against blanket secrecy laws of the Cayman Islands.[83] Not surprisingly, the Fifth Circuit found that the Cayman Islands' interest "must give way."[84]

The court observed that "[u]nder our system of jurisprudence the grand jury's function in investigating possible criminal violations is vital."[85] After elaborating on this proposition, the court held that "[t]o defer to the law of the Cayman Islands and refuse to require Field to testify would significantly restrict the essential means that the grand jury

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I think the record should show that this court finds that there is, in fact, a reasonable probability that Mr. Field is going to be exposed to some criminal charges and some criminal punishment for violating the Cayman Bank Secrecy Act.

Id.

[79] *Id.*

[80] *Id.* at 407. Field also reiterated his fifth amendment argument, again without success: The court held that the subpoena [was] not an attempt to elicit information from Field which [would] later be used against him in a criminal case. The fifth amendment is simply not pertinent to the situation where a foreign state makes the act of testifying a criminal offense. *Id.*

See generally S. Arkin, *The Fifth Amendment and Fear of Foreign Prosecution*, BUS. CRIME COMMENTARY, Mar. 1987, at 2; Comment, *Fear of Foreign Prosecution and the Fifth Amendment*, *supra* note 55; Murphy v. Waterfront Commission, 378 U.S. 52 (1964); United States v. Araneta, 794 F.2d 920 (4th Cir.), *stay granted*, 107 S. Ct. 331 (1986); United States v. Mikutaitis, 800 F.2d 159 (7th Cir.), *stay granted*, 107 S. Ct. 310 (1986) (for a further discussion of this argument).

[81] *Field*, 532 F.2d at 407 (citing *United States v. First National City Bank*, 396 F.2d 897 (2nd Cir. 1968); RESTATEMENT (SECOND) FOREIGN RELATIONS LAW, *supra* note 61, § 40. *See supra* pt. II(B).

[82] *Field*, 532 U.S. at 407. *See generally* American Industrial Contracting, Inc. v. Johns-Manville Corp., 326 F. Supp. 879 (W.D. Pa. 1971); RESTATEMENT (SECOND) FOREIGN RELATIONS LAW, *supra* note 61, § 39 (cited by the court as support for this proposition).

[83] The first and most important factor . . . is the relative interest of the states involved. . . . [T]he United States seeks to obtain information concerning the violation of its tax laws. . . . [T]he Cayman Islands seeks to protect the right of privacy that is incorporated into its bank secrecy laws. Unfortunately, the Cayman Government position appears to be that any testimony concerning the bank will violate its laws.

Field, 532 F.2d at 407. *See supra* pt. II(B).

[84] *See Field*, 532 F.2d at 407.

[85] *Id.*

has of evaluating whether to bring an indictment."[86]

The court offered two additional reasons why U.S. interests should prevail: "[t]here could be no question that Field would be required to respond to the grand jury's questions if this was solely a domestic case."[87] Since Field could be required to respond to the questions if he were a citizen of the United States, the court found no barrier to imposing a similar requirement, notwithstanding the fact that he was *not* a citizen of the United States.[88]

The Fifth Circuit also "reject[ed] Field's contention . . . that only an economic regulation"[89] was involved, stressing the vital national interest of revenue collection.[90]

The Bank of Nova Scotia[91] "attempt[ed] to distinguish *Field* . . . on four grounds."[92] The Bank began by pointing out that it was "not under

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[86] *Id.* at 408.

[87] *Id.* As support for this observation, the court cited the "wide discretion" which "this country allows . . . to investigative bodies in obtaining information concerning bank activities." *Id.* The court also relied upon similar practices in the United Kingdom and in Switzerland, as well as in the Cayman Islands:

> [A]t oral argument, [Field's] attorney conceded that under Cayman law the director of banking in the Cayman Islands would be able to obtain information from Field concerning the bank's operations in investigations instituted by legal authority in the Cayman Islands. In short, Field seeks to prohibit a [U.S.] grand jury from obtaining information that would have been obtainable by officials there for their own investigations. Since the general rule appears to be that for domestic investigations such information would be obtainable, we find it difficult to understand how the bank's customers' rights of privacy would be significantly infringed simply because the investigating body is a foreign tribunal.

Id.

[88] *See infra* note 90.

[89] *Field*, 532 F.2d at 408.

[90] *Id.* at 409.

> The collection of revenue is crucial to the financial integrity of the republic. In addition, the subject being investigated by this grand jury . . . has been demonstrated to be a severe law enforcement problem. . . . If this court were to countenance Mr. Field's refusal to testify it would significantly restrict the ability of the grand jury to obtain information which might possibly uncover criminal activities of the most serious nature. In light of the . . . significant interest this nation has in tax enforcement, without any specific direction from Congress, we see no reason not to enforce the subpoena.

Id. at 408-09 (footnotes omitted). *See generally* H.R. REP. No. 91-975, 91st Cong., 2d Sess. 12, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4397 (supporting the court's proposition that the subject of the grand jury investigation constituted "a severe law enforcement problem").

[91] *See supra* note 69 and accompanying text.

[92] *Nova Scotia I*, 691 F.2d at 1390.

> The district court concluded that because compliance with the subpoena [might] cause the Bank to violate Bahamian penal laws, it was appropriate to follow the balancing test adopted in *Field*. Because we conclude this case is controlled by *Field*, we affirm the court below.

Id. at 1389. Although there is some ambiguity in the language of the opinion, it appears that the Bank conceded the applicability of the Restatement balancing test, but argued that the district court

investigation by the grand jury, unlike the situation in *Field*."[93] The Eleventh Circuit found that this was not significant, "[a] careful reading of *Field* reveals that the fact that Castle Bank and Trust Company was under investigation did not affect the court's analysis."[94]

The Bank also contended that its "case was distinguishable from *Field* because documentary evidence [was] requested rather than testimonial evidence as in *Field*."[95] The Eleventh Circuit found that this distinction "while real, [was] immaterial,"[96] reasoning that "whether the subpoena [would] be enforced [was] a matter of international comity."[97]

The Bank then argued that its case was "distinguishable from *Field* because the . . . subpeona call[ed] for information located in the Bahamas instead of the United States."[98] The court rejected this argument because it found that (a) "the disclosure to the grand jury will occur in this country . . . [and (b)] the affront to the Bahamas occurs no matter where the information is originally located."[99]

Finally, the Bank contended that the government " 'could avoid . . . disrespect for the sovereignty of a friendly nation' by . . . applying for an order . . . permitting disclosure from the Supreme Court of the Bahamas."[100] The court rejected this argument on grounds that the procedure was adverse to the sovereignty interests of the United States.[101] The

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had erred in the analysis which it had utilized in applying the test to the facts that were before it. *See, e.g., id.* at 1389-91.

[93] *Id.* at 1390.

[94] *Id.*

> [The *Field*] court was concerned with the proliferation of foreign secret bank accounts utilized by Americans to evade income taxes and conceal crimes. . . . The instant subpoena calls for the production of certain records relating to bank accounts of a U.S. citizen pursuant to a tax and narcotics investigation.

Id. (citation omitted).

[95] *Id.*

[96] *Id.* "Whether the requested information is testimonial or documentary, the effect on the competing state interests will be the same. The deference accorded the Bahamian interest is not to be diminished by the form of the requested information." *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.* "[T]he interest of the Bahamas in preserving the secrecy of these records is impinged by the fact of disclosure itself." *Id.*

[100] *Id.*

[101] *See id.* at 1391.

> The judicial assistance procedure does not afford due deference to the United States' interests. In essence, the Bank asks the court to require our government to ask the courts of the Bahamas to be allowed to do something lawful under U.S. law. We conclude such a procedure to be contrary to the interests of our nation and outweigh the interests of the Bahamas.

Id. The court also found it significant that

> [a]pplying for judicial assistance . . . is not a substantially equivalent means for obtaining production because of the cost in time and money and the uncertain likelihood of success

situation was analytically indistinguishable from that which was at issue in *Field*.[102]

The Eleventh Circuit reached an identical result several years later in the second Bank of Nova Scotia case.[103] The Bank was served with a grand jury subpoena *duces tecum* requiring the production of documents "from the Bank's branches in the Bahamas, the Cayman Islands and Antigua."[104] It moved to quash, "asserting that if it complied . . . it would violate the secrecy laws of the Bahamas and the Cayman Islands."[105] The district court denied the motion and ordered the Bank to produce the documents.[106]

The Bank made no effort to comply with the court's order other than filing a petition before the Grand Court of the Cayman Islands.[107] This petition sought permission to disclose the documents sought by the subpoena.[108] "The Grand Court . . . denied the petition . . . [and] ordered the Bank not to produce the documents."[109] Thereafter, the Bank filed another motion seeking relief from the subpoena.[110] The district

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in obtaining the order. According to the affidavit from a member of the Honorable Society of Lincoln's Inn, England, and of the Bahamas Bar, the Supreme Court of the Bahamas does not have power to order disclosure if the subject of the investigation is criminal only under the tax laws of the United States. Therefore, it is not clear to any degree of certainty that the Bahamian court would order disclosure of all the requested documents.

Id. at 1390-91 (footnote omitted). Also, "[t]he Bank conceded at oral argument that if the grand jury [were] conducting a tax investigation the documents could not be obtained through the judicial assistance procedure." *Id.* at 1391 n.8.

[102] *See id.* at 1391. *See also supra* notes 89-92 and accompanying text.

In *Field* the vital role of a grand jury's investigative function to our system of jurisprudence and the crucial importance of the collection of revenue to the "financial integrity of the republic" outweighed the Cayman Islands' interest in protecting the right of privacy incorporated into its bank secrecy laws. . . . The [U.S.] interest in the case before us has not been diminished since *Field* was decided. The Bank asserts the Bahamas' interest in the right of privacy; this interest is similarly outweighed. A Bahamian court would be able to order production of these documents. . . . It is incongruous to suggest that a U.S. court afford greater protection to the customer's right of privacy than would a Bahamian court simply because this is a foreign tribunal.

Id. (citations omitted).

[103] United States v. Bank of Nova Scotia, 722 F.2d 657 (11th Cir. 1983), *on remand* 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) [hereinafter *Nova Scotia II*].

[104] *Nova Scotia II*, 740 F.2d at 820 (footnote omitted).

[105] *Id.* (footnote omitted). *See also supra* pt. II(A).

[106] *Nova Scotia II*, 740 F.2d at 820.

[107] *Id.*

[108] *Id.* A denial of the petition was issued with leave granted to the Bank to later renew the petition. The denial was not appealed. *Id.*

[109] *Id.* at 821.

[110] The Bank's only effort to locate any documents either in the Bahamas or in the Caymans between the June first motion and scheduled October hearing was a search conducted in Nassau on October 14, 1983, which produced no documents. The only document produced by the Bank during this seven month period was a xerox copy of a draft drawn . . . by the branch in Nassau. . . .

court denied this motion and ordered the Bank to comply with the subpoena or face a contempt hearing.[111]

The Bank again made no attempt to comply, and the hearing was convened as scheduled.[112] Because it found that the Bank had not made a good faith effort to comply with the subpoena, the court held the Bank in contempt and "imposed a fine of $25,000 per day continuing until the Bank complied . . . or the grand jury expired."[113] The Attorney General of the Bahamas issued an order allowing the Bank to produce the documents requested by the subpoena.[114] The Bank then delivered various documents from its Bahamian branches.[115] When the Governor of the Cayman Islands authorized the disclosure of the documents which were located at the Bank's Cayman Islands branch,[116] the Bank immediately produced the documents in question.[117]

Thereafter, a bank inspector "arrived in Nassau . . . and immediately discovered additional documents in two of the Bank's Bahamian branches."[118] Later, this same inspector was preparing for an appearance before the grand jury when he realized that documents "were still missing."[119] These documents were eventually produced.[120]

During this chain of events, the Bank was in the process of appealing the finding of contempt and the fine imposed by the district court.[121]

Id. (footnote omitted).

111 *Id.*

112 *Id.*

After this disclosure, the Assistant United States Attorney insisted that there were Bahamian documents still missing. The Bank reiterated that all of its branches in Nassau had been searched and there were no other documents in the Bahamas.

Id.

113 *Id.*

114 *Id.* This authorization followed a Cayman Grand Court decision reiterating its refusal to allow the Bank to produce the documents. *Id.*

115 *Id.* The Assistant U.S. Attorney again insisted that a substantial number of documents had not been produced. *Id.*

116 *Id.* at 822 (footnote omitted). His arrival was apparently prompted by a court order. *See id.*

117 *Id.* at 822.

118 *Id.* at 822-23. The inspector was assigned to "appear before the grand jury—to authenticate all of the documents that had been produced." *Id.* at 822.

119 *Id.* at 822-23.

120 *Id.* at 823 (They were delivered to the grand jury on Jan. 25, 1984.).

121 The appeal was initiated shortly after the order was entered; on December 28, 1983, the Eleventh Circuit issued an opinion remanding the matter to the district court for further proceedings. United States v. Bank of Nova Scotia, 722 F.2d 657 (11th Cir. 1983). The court remanded the matter (a) because it found that "the enforcement of such subpoenas requires the balancing of many factors including the national interests of the countries involved," and (b) because it was concerned that although "the district court attempted to do this," the attempt was flawed due to the fact that "much relevant information was either not available or deliberately withheld or both." *Id.* at 658. The court stayed the imposition of the fine until Nov. 14, 1983. *Nova Scotia II*, 740 F.2d at 821.

In this appeal, the Bank argued that the district court erred in imposing a contempt sanction because (a) the Bank had made a good faith attempt to comply with the subpoena, and (b) compliance with the subpoena required it to violate Cayman Islands secrecy laws.[122]

The Eleventh Circuit rejected the first argument, finding that the Bank had "blithely ignored" all warnings and persisted in refusing "to perform a diligent search" of the documents held by its various branches.[123] It also rejected the second argument, finding that the district court had correctly "balanc[ed] the several factors enunciated in [s]ection 40 of the Restatement . . . [and] properly concluded that enforcement of the subpoena was proper."[124]

With regard to the second finding, the court held that enforcement was proper because the subpoena was intended to "obtain information concerning the money transactions of individuals who are the target of a narcotics investigation."[125] Since such investigations are "a concern of paramount importance to our nation," . . . the [e]nforcement . . . [was] consistent with the grand jury's goals of investigating criminal

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122 *Nova Scotia II*, 740 F.2d at 824, 826. The argument that enforcement was precluded by the fact that production would require the bank to violate Cayman Islands law actually appeared in two guises, the first of which involved the application of the Restatement balancing test. *See supra* notes 123-29 and accompanying text.

The second appearance involved invocation of the act of state doctrine. *See supra* note 63. The *Nova Scotia II* court found that

> [t]he doctrine is completely inapplicable to this case. The . . . doctrine is primarily designed to avoid impingement by the judiciary upon the conduct of foreign policy by the Executive Branch. It is aimed at preventing judicial interference with the conduct of foreign relations by questioning the validity of the acts of foreign sovereigns in the context of a civil suit.

Nova Scotia II, 740 F.2d at 831 (footnote omitted). The court then held that section 41 of the Restatement (Second) of Foreign Relations Law: "render[ed] [the doctrine] completely inapplicable in the investigatory or criminal context." *Id.* The court also found that the doctrine did not apply to the facts before it "because the Cayman Grand Court purported to control conduct in the United States by blocking compliance with the grand jury subpoena"; the *Nova Scotia II* court concluded that this action of the Cayman Court was itself a violation of the doctrine. *See id.* at 832. And, finally, the court agreed with the district court that U.S. "law does not require blindly giving effect to the act of a foreign sovereign without 'having due regard . . . to the rights of its own citizens, or of other persons who are under the protection of its laws.' " *Id.* (quoting Hilton v. Guyot, 159 U.S. 113, 164 (1895)).

The Bank had also asserted that reversal of the contempt order was necessitated by the fact that the district court's action ignored a diplomatic agreement between the United States and the Cayman Islands. *See id.* at 824, 829-30. And two *amici*, the United Kingdom and the Cayman Islands, contended that the "subject subpoena [was] void because it was issued contrary to the provisions of the Single Convention on Narcotic Drugs, 1961." *Id.* at 830-31.

123 *Id.* at 826.

124 *Id.* at 827. In the opinion, the treatment of the issues of "good faith" and the application of the balancing test are juxtaposed in a manner that makes it clear that the court is applying the modified balancing test described in pt. II(B). *See supra* pt. II(B).

125 *Nova Scotia II*, 740 F.2d at 827.

matters."[126]

The court also found that enforcement was not an intolerable infringement upon Cayman Islands bank secrecy: Even if "an absolute right to privacy" existed under Cayman Islands law, its application to American depositors was "substantially reduced when balanced against the interests of their own government engaged in a criminal investigation since they are required to report [their] transactions to the United States."[127] Also, the court noted that the Cayman Islands interest "in protecting the privacy of [its] bank customers is also diminished . . . since the investigating body is a federal grand jury which is required by law to maintain the secrecy of its proceedings."[128]

As an almost-afterthought, the court parsed the remaining requirements of the Restatement balancing test:

> [D]isclosure . . . would take place in the United States. The foreign origin of the subpoenaed documents should not be a decisive factor. The nationality of the Bank is Canadian, but its presence is pervasive in the United States. The Bank has voluntarily elected to do business in numerous foreign host countries and has accepted the incidental risk of occasional inconsistent governmental actions.[129]

With respect to the latter proposition, the court quoted a passage from *Field* in which that court found that it could "not acquiesce in the proposition that [U.S.] criminal investigations must be thwarted whenever there is conflict with the interest of other states."[130]

The *Bank of Nova Scotia* and *Field* decisions illustrate that under the balancing test as recently applied, "almost nothing can overcome the

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126 *Id.* at 827, 829. With respect to this issue, the court essentially reiterated the portions of the *Field* and *Nova Scotia I* opinions that predicated their holdings upon the importance of the grand jury process. *See supra* notes 87, 104 and accompanying text.

127 *Nova Scotia II*, 740 F.2d 828 (citing 31 U.S.C. § 1121 and 31 C.F.R. § 103.24 (1979)). As further support for this proposition, the court quoted from a brief that had been filed with the Jamaica Court of Appeals. The quotation was to the effect that "the Confidentiality Laws of the Cayman Islands should not be used as a blanket device to encourage or foster criminal activities," from which the *Nova Scotia II* court concluded that the enforcement with Cayman Islands policy against the use of its "business secrecy law" in this regard. *See id.* at 827-28.

128 *Id.* at 827-28 n.16 (citing United States v. Vetco, 644 F.2d 1324, 1331 (9th Cir. 1981)); *see* FED. R. CRIM. P. 6(e).

129 *Nova Scotia II*, 740 F.2d at 828 (footnotes omitted). With respect to the importance of the "situs of the records," the court found that "[t]his position is advanced only in a tentative draft of the Restatement" and that it "has been explicitly rejected by the State Department." *Id.* at n.17 (citing Compelling Discovery and Evidence in International Litigation, Address by Honorable Davis R. Robinson, The Legal Advisor, U.S. Department of State, to the Bar Association of the City of New York (Feb. 14, 1984)).

130 *Nova Scotia II*, 740 F.2d at 828 (quoting U.S. v. Field 532 F.2d 404, 410 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976). The *Nova Scotia I* court also quoted this same passage to the same effect. *See Nova Scotia I*, 691 F.2d at 1391.

interests of the United States in enforcing its criminal laws."[131] Although there have been decisions to the contrary,[132] the almost-inevitable outcome is that the interests of the foreign sovereign will be determined to be inferior to those of the United States and disclosure will be ordered.

D. *Necessity for "Compelled Consents" as an Alternative to the Restatement Balancing Test*

Given that disclosure is almost inevitable under the Restatement balancing test, one wonders why it was necessary to invent "compelled consents." The answer lay in the area of foreign policy and international relations.

Although disclosure is essentially a *fait accompli* under the Restatement test, it is often achieved at the expense of amicable relations between the nations involved: "Insistence on the gathering of evidence at

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131 INTERNATIONAL CRIMINAL LAW, *supra* note 3, at 260-61. *See also* United States v. Davis, 767 F.2d 1025 (2d Cir. 1985) (U.S. interest in enforcing fraud laws outweighs interest of Cayman Islands in banking secrecy); United States v. Vetco, Inc., 644 F.2d 1324, *modified*, 691 F.2d 1981 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981)(U.S. interest in enforcement of its revenue laws outweigh Swiss interest in banking secrecy); United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968) (U.S. interest in enforcement of antitrust laws outweighs German interests in bank secrecy); Garpeg, Ltd. v. United States, 583 F. Supp. 789 (S.D.N.Y. 1984) (U.S. interest in enforcing revenue lase outweighs Hong Kong interest in bank secrecy); SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y 1981) (U.S. interests in preventing insider trading outweighed Swiss bank secrecy interest where Swiss bank acted in bad faith). *See generally* United States v. Bowe, 694 F.2d 1256 (11th Cir. 1982) (attorney-client privilege not sufficient to overcome interests in disclosure).

132 *See, e.g.*, United States v. First National Bank of Chicago 699 F.2d 341 (7th Cir. 1983); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960). In the *First National Bank* case, the IRS issued a summons to a Chicago bank; the summons required production of the bank statements of a customer whose funds were located in the bank's Athens branch. *First National Bank*, 699 F.2d at 324. The bank refused to furnish the information, asserting that "under the Greek Bank Secrecy Act, any and all of [its] employess— whether in Greece of elsewhere—who reveal[ed] exact account information about depositors of [the] Branch in Athens to any third party [could] be subject . . . to criminal penalties, including . . . not less than a six-month prison sentence." *Id.*

The IRS then filed a petition seeking to enforce the summons; after the district court ordered compliance, First Chicago appealed to the Seventh Circuit. *Id.* at 342-43. The Seventh Circuit applied the Restatement balancing test and found that the district court's order compelling production was an abuse of discretion. *Id.* at 345. The court distinguished the Eleventh Circuit's decision in *Nova Scotia I* on three grounds: (1) that the court of appeals had the benefit of findings by the district court, including a finding that the bank had not "made a good faith effort to comply with the subpoena"; (2) that subpoena sought information as an incident to "a tax and narcotics investigation so that the interest of the United States in the investigation and enforcement of its criminal laws was involved as well as its interest in [the] determination and collection of taxes"; and (3) that "[t]he foreign law . . . was different . . . in that disclosure with the consent of the customer would not be a criminal offense and the power of a Bahamian court to permit disclosure did not appear to be as strictly limited" as under Greek law. *Id.* at 347. *See also* Minpeco, S.A., v. Conticommodity Services, Inc., 116 F.R.D. 517 (S.D.N.Y. 1987) (applying the balancing test and denying a motion to compel in the context of civil litigation).

all costs may win U.S. prosecutors some cases, but it is making enemies of many otherwise friendly foreign governments."[133] That is, while U.S. "law enforcement officials [view their] subpoenas [as] a legitimate and direct means of obtaining information[,] . . . many foreign governments consider . . . subpoenas issued to persons outside the United States as intrusive and an infringement on their sovereignty."[134]

While it is possible to address these issues through other means,[135] "compelled consents" provide a useful alternative to the Restatement in that they eliminate the necessity for "balancing" the interests of the re-

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133 INTERNATIONAL CRIMINAL LAW, *supra* note 3, at 265. "Third-party witnesses caught in a conflict between the laws of two countries are certain to become increasingly annoyed at their untenable position and may lobby foreign governments for even stronger blocking and bank secrecy laws." *Id.*

134 *Id.* at 301. The D.C. Circuit addressed this issue recently in *In Re*: Sealed Case, slip op., case no. 87-5208. 87-5209 (D.C. Cir., Aug. 7, 1987). The appeals were from district court orders "compelling appellants, a bank and an individual, to respond to a grand jury subpoena by producing documents and giving testimony." *Id.* The bank was "owned by the government of Country X", while the individual was "a citizen of country X" who was "currently employed as the manager of the bank's agency in a city in the United States." *Id.* The manager also had "significant family and property connections to Country Y." *Id.*

The manager argued that requiring him to comply with the subpoena violated the fifth amendment in that "Country Y could [thereupon] convict him of a crime . . . for revealing information protected by [its] bank secrecy law." *Id.* The court rejected this argument because it found that such a conviction could only result from the manager's "own voluntary act— returning to Country Y." *Id.* Since he no longer resided in that country, the privilege did not apply to "protect against dangers voluntarily assumed." *Id.*

With regard to the bank, however, the court held that the district court erred in compelling compliance with the subpoena. *Id.* "The subpoena sought bank documents created and held in the bank's branch office in Country Y." *Id.* To enforce the subpoena, therefore, would be to require the bank to violate "the laws of Country Y on Country Y's soil." *Id.* The court found that this was unacceptable under "basic principles of international comity": "We have little doubt . . . that our government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders." *Id.* The court also found that the act of state doctrine, and attendant concerns, provided "good reason for courts not to act on their own . . . when their actions may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Id.* (quoting Banco National de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964)). The court felt that such matters were more appropriately resolved by the legislative and/or executive branches, and noted that is was "also relevant . . . that the grand jury [was] not left empty-handed" by its decision, given that the bank manager was "available . . . to testify as to many of the facts that the grand jury may wish to ascertain." *Id.*

135 If potentially major international conflicts are to be avoided, the United States must begin to take a long-term view of the problem, including expansion of and adherence to bilateral and multilateral agreements, encouragement of foreign countries to improve their domestic laws while at the same time taking into account their respective national priorities, and exploration of the possibility of enacting uniform laws.

In the short term, the United States government must engage in a "balancing test" of its own to determine when its insistence on obtaining foreigh evidence at all costs is worth the potential diplomatic problems that may ensue.

INTERNATIONAL CRIMINAL LAW, *supra* note 3, at 265.

spective sovereignties.[136] By eliminating this necessity, "compelled consents" allow extraterritorial discovery to proceed while minimizing adverse effects on diplomatic relations.

III. "COMPELLED CONSENTS": THE FIFTH AMENDMENT AND THE FORCED PRODUCTION OF FOREIGN BANKING AND COMMERCIAL DOCUMENTS

This part addresses: (1) the relationship between the fifth amendment guarantee against compelled self-incrimination and the act of producing documentary evidence; and (2) the extent to which the execution of a "compelled consent" is analogous to the act of producing documentary evidence, for fifth amendment purposes.

A. The "Act of Production" Doctrine[137]

The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ."[138] In 1886, the U.S. Supreme Court in *Boyd v. United States*[139] extended the protections of the privilege to the act of producing documentary evidence, holding that the compulsory production of such evidence is the functional equivalent of requiring an individual to be a witness against himself and is, therefore, an act which is encompassed by the privilege.[140]

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136 *See, e.g., id.* at 265 n.120 (citing Garpeg, Ltd. v. United States, 583 F. Supp. 789 (S.D.N.Y. 1984) and United States v. Ghidoni, 732 F.2d 814 (11th Cir 1984)).

137 For an overview of this doctrine, see Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1 (1987); Note, *The Fifth Amendment and Production of Documents after United States v. Doe*, 66 B.U.L. REV. 95 (1986).

138 U.S. CONST. amend. V. For the history of the privilege against self incrimination, see L. LAVY, ORGINS OF THE FIFTH AMENDMENT (1968). In England the privilege arose as the result of a rivalry that developed between the ecclesiastical courts, which untilized a self-incriminating oath as an essential element of their procedure, and the common law courts, which "sought to restrict the use of the intimidated procedure." Note, *Compelling Signature of Consent Forms to Supply the Government With Foreign Bank Records Violated the Fifth Ammendment*, 16 CUMB. L. REV. 165, 167 (1985) [hereinafter Note, *Compelling Signature*] (citing M. BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION 6 (1980)). The rivalry generated

> [t]he often quoted but seldom followed maximum, *Licet nemo tenetur selpsom proderer, tamen proditus per faman tenentur selpsom ostendere utrum suam innocentiam ostemdere et selpsum* (Though no one is bound to become his own accuser, yet when once a man has been accused (pointed out as guilty by general report), he is bound to show whether he can prove his innocence and to vindicate himself.).

Id. at 167 n.21 (quoting Wigmore, *Nemo Tenetur Selpsum Prodere*, 5 HARV. L. REV. 71 (1981)).

139 116 U.S. 616 (1886).

140 *Id.* "[W]e are . . . of [the] opinion that a compulsory production of the private books and papers of [an individual] . . . is compelling him to be a witness against himself, within the meaning of the [f]ifth [a]mendment to the Constitution." *Id.* at 634-35. *See also id.* at 630 ("any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to

The Court retreated from this position in *Fisher v. United States*[141] which was handed down in 1976. In *Fisher*, the Court reconsidered the *Boyd* holding in light of the proposition that "the [f]ifth [a]mendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating."[142] The Court found that the *contents* of documentary evidence do not constitute compelled testimony and are not, therefore, encompassed by the amendment's right against compelled self-incrimination.[143]

It also held, however, that "[t]he act of producing evidence in response to a subpoena nevertheless has communicative aspects, wholly aside from the contents of the papers produced."[144] The *Fisher* Court found that production can "tacitly concede [a] the existence of the papers demanded, [b] their possession or control by the . . . [individual to whom the subpoena is addressed, and (c)] also would indicate the [individual's] belief that the papers are those described in the subpeona."[145]

Based upon this finding, the Court concluded that although "[t]he elements of compulsion are clearly present [in such a situation,] the more difficult issues are whether these tacit [concessions] are both 'testimonial' and 'incriminating' for purposes of applying the [f]ifth [a]mendment."[146] It then held that the "resolution [of these issues] . . . depend[s] on the facts and circumstances of particular cases or classes thereof," so that no "categorical answers" are possible.[147]

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convict him of [a] crime or to forfeit his goods is within the condemnation of" the fifth amendment privilege against self-incrimination).

141 425 U.S. 391 (1976).

142 *Id.* at 408. In a succeeding passage, the Court illustrated the significance of a compelled "testimonial" communication by noting that it had "declined to extend the protection of the privilege to the giving of blood samples, to the giving of handwriting exemplars, voice exemplars, or donning of a blouse worn by the perpetrator." *Id.*, (citing Schmerber v. California, 384 U.S. 757, 763-64 (1966); Gilbert v. California, 388 U.S. 263, 265-67 (1967); United States v. Wade, 388 U.S. 218, 222-23 (1967); and Holt v. United States, 218 U.S. 245 (1910)).

143 "[T]he preparation of all of the papers sought . . . was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else." *Fisher*, 425 U.S. at 409-10 (footnote omitted). "[B]y definition, the contents of such records are not *compelled* testimony, because they were created before the government sught to force their production as evidence." Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV., 683, 685 (1982) [hereinafter Note, *Criminal Defendants*]. *Boyd* indicated that the contents of documents were protected by the privilege. *Boyd*, 116 U.S. at 630. Subsequent decisions supported this construction of the *Boyd* holding. *See, e.g.*, United States v. White, 322 U.S. 694, 699 (1944); *Schmerber*, 384 U.S. at 763-64.

144 *Fisher*, 425 U.S. at 410.

145 *Id.* at 410 (citing Curcio v. United States, 354 U.S. 118, 125 (1957)).

146 *Fisher*, 425 U.S. at 410.

147 *Id.* at 410. The Court then proceeded to analyze the "facts and circumstances of the particular case[ ]" that was before it, and held that "compliance with a summons directing [a] taxpayer to

Several years later in *United States v. Doe*,[148] the Court returned to this issue: the question was whether the privilege against self-incrimination encompasses the contents of the business records of a sole proprietorship. The Court found that the contents are not so protected,[149] but reiterated that production is privileged so long as it has "testimonial aspects and incriminating effect."[150] *Doe*, therefore, "firmly established that the fifth amendment is violated only if the defendant's conduct is compelled, testimonial, and incriminating."[151]

B. Execution of "Compelled Consents"

The decisions which have addressed the use of "compelled consents" have split. The issue is whether the "consent" violates the fifth amendment privilege against self-incrimination. This part examines these decisions.

1. No Fifth Amendment Violation

United States v. Ghidoni[152] was the first decision to examine "compelled consents." As noted above,[153] the case arose from Ghidoni's refusal to execute a consent directive, or "compelled consent," that would have permitted U.S. law enforcement agents to obtain records from his

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produce [his] accountant's documents . . . involve[s] no incriminating testimony within the protection of the Fifth Amendment." *Id.* at 410, 414. *See also infra* pt. IV(B).

148 465 U.S. 605 (1984).

149 *Id.* at 612. The reasoning was as follows: Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or reaffirm the truth of their contents." *Id.* at 611-12 (footnotes omitted). Absent such preparation and/or affirmation, the privilege does not apply: "[T]he [f]ifth [a]mendment only protects the person . . . from *compelled* self-incrimination. Where the preparation of business records is voluntary, no compulsion is present." *Id.* at 612 (citation omitted).

150 *Id.* at 612. *See also id.* at 612 ("[a]lthough the contents of a document may not be privileged, the act of producing the document may")(citing Fisher, 425 U.S. at 410). The Court's holding was, however, limited to the contents of *business*, as opposed to *personal*, records, although certain of the justices were split on this issue. *Compare Doe*, 465 U.S. at 618 (O'Connor, J., concurring)("the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind") *with* 465 U.S. at 619 (Marshall, J., concurring in part and dissenting in part)(*Doe* opinion did not "reconsider [] whether the Fifth Amendment provides protection for the contents of "private papers of any kind"). These and other ambiguities in *Doe* led one judge to characterize the opinion as offering "amphibolic guidance [which consigns] . . . the lower federal courts . . . discerning the present state of the law surrounding the fifth amendment privilege [to the role of] tea leaves reader'. *In re* Grand Jury Subpoenas Served Feb. 27, 1984, 599 F. Supp. 1006, 1009 (E.D. Wash. 1984) (quoting United States v. Karp, 484 F. Supp. 157, 158 (S.D.N.Y. 1980)).

151 Moesteller, *supra* note 137, 6-7 (1987)(footnote omitted). It is not necessary that "[t]he item demanded . . . be testimonial in nature." *Id.* at 7 n.15. "The relevant question is whether the act of producing the item is itself testimonial." *Id.*

152 732 F.2d 814 (11th Cr.), *cert. denied*, 469 U.S. 932 (1984).

153 *See supra* notes 3-4 and accompanying text.

Cayman Islands bank.[154]

Ghidoni's refusal was predicated upon the contention that "compelled execution of the directive would violate his right against self-incrimination."[155] After the district court rejected his contention and held him in contempt, Ghidoni appealed.[156]

The Eleventh Circuit began its analysis of Ghidoni's fifth amendment claim by pointing out that he "ha[d] not asserted, nor could he argue, that the contents of the bank records [were] eligible for protection under the [f]ifth [a]mendment. . . . Rather, Ghidoni's assertion of privilege centers on the alleged testimonial and incriminating aspects of his compelled signing of the directive."[157]

Ghidoni relied upon *Fisher*, arguing that "signing the directive would have testimonial aspects, i.e., [it] "would be an implicit assertion that the Cayman Islands bank accounts existed, were authentic, and that he controlled them."[158] He also contended that "these three elements [were] . . . in dispute," so that "his compelled signing would be testimony attesting to" them which would "form an incriminating link assisting the government in meeting its burden of proof."[159]

The Eleventh Circuit rejected Ghidoni's arguments.[160] With regard to the first element, the court found that because "the directive state[d] that *if* the accounts exist, the bank is permitted to disclose records of those accounts to the government. . . . [But it] contain[ed] no implicit

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154 *Ghidoni*, 732 F.2d at 815. "In futherance of its investigation [of Ghidoni], the government issued a subpoena to the Miami, Florida branch of the Bank of Nova Scotia, commanding production of bank records relating to Ghidoni's accounts." *Id.* at 816. Bank officials "expressed concern that production . . . would subject bank employees to criminal liability under the Confidential Relationships (Preservation) Law of the Cayman Islands . . . [and] suggested that problems with the Cayman Island law could be avoided if Ghidoni would execute a directive consenting to disclosure." *Id. See also supra* notes 30-42 and accompanying text. "Accordingly, the government [then] obtained [a] district court order compelling Ghidoni "to execute a consent directive authorizing disclosure of "all information" and delivery of "all documents of every nature" relating to accounts which he maintained at either branch of the Bank of Nova Scotia. *Ghidoni*, 732 F.2d at 816.

155 *Ghidoni*, 732 F.2d at 816.

156 *Id.*

157 *Id.* at 817 (citing United States v. Miller, 415 U.S. 435 (1976); California Bankers Ass'n v. Shultz, 416 U.S. 21, 55 (1974) (citation and footnotes omitted). The citations were apparently appended in support of the proposition that "[i]t is well-established [that] bank records are not protected form disclosure by any constitutional privilege." *Id.* (citation omitted). The above-quoted comments are followed by a lengthy quotation from the *Fisher* opinion, the import and significance of which apparently is to establish that "[t]he elements of compulsion [were] clearly present "on the facts which were before the court, given that these facts involved the enforcement of a subpoena requiring the production of certain documents. *Id.* (quoting Fisher v. United States, 425 U.S. 391, 411 (1976)).

158 *Ghidoni*, 732 F.2d at 818.

159 *Id.* (footnote omitted). Ghidoni's contentions are, of course, predicated upon the test which was enunciated in *Fisher*. *See supra* note 145 and accompanying text. *See also infra* pt. IV(B).

160 *Ghidoni*, 732 F.2d at 818.

testimony that the records [did] in fact exist."[161] With regard to control, it found (a) that "Ghidoni . . . denied control over any accounts with the bank"[162] and (b) that "the directive [did] not contradict this testimonial assertion"[163] in that it "[made] no explicit statement regarding" his control thereof.[164]

With regard to the third and final element of the *Fisher* test,[165] the court found that "only the bank could authenticate the records at issue."[166] Thus, Ghidoni's execution of the consent directive could not yield a testimonial assertion to this effect. The court concluded that, because the account records were held by the bank, "any testimony on [their] existence, control or authentication . . . would have to come from

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161 *Id.* ("nothing in the directive implies that such accounts exist").

162 *Id.*

163 *Id.* (footnote omitted).

164 *Id.* "Rather the directive merely permits the bank to disclose information relating to any accounts with respect to which the *bank records* indicate Ghidoni's authority to draw (i.e., any accounts with respect to which the bank *thinks* Ghidoni has authority)." *Id.*

> In other words, we read the directive as equivalent to a statement by Ghidoni that, although he expresses no opinion with regard to the existence of or his control over any such accounts, he is authorizing the bank to disclose information relating to accounts which, in the bank's opinion (or with respect to which the bank records indicate), Ghidoni controls.

Id. at 818 n.8. The court then concluded that "[b]ecause the directive contains no statement by Ghidoni on either control or existence of the accounts, the directive could not be used by the government as an admission thereof." *Id.* at 818 (footnote omitted). This conclusion is accompanied by a note in which the court indicates that its finding in this regard is not to be construed as "affording Ghidoni any constructive immunity regarding subsequent use of the directive . . . . Rather, we simply hold that the directive in the instant case lacks any probative testimonial value on the issue of control or existence." *Id.* at 818 n.9 (citation omitted). The reference of "constructive immunity" was a reference to the *Doe* case, which rejected the government's proposed "doctrine of constructive use immunity . . . [u]nder [which] . . . the courts would impose a requirement on the Government not to use the incriminatory aspects of the act of production . . . even though the statutory procedures [for granting such immunity] have not been followed." *Doe*, 465 U.S. at 616. *See also supra* pt. III(A).

165 *See supra* note 145 and accompanying text. Before proceeding to the third element, the court interjected the following observation: "Because the directive contain[ed] no statement by Ghidoni on either control or existence of the accounts, [it] could not be used by the government as an admission thereof." *Ghidoni*, 732 F.2d at 818 (footnote omitted). In the omitted note, the court was careful to explain that it was not "affording Ghidoni any 'constructive immunity' regarding subsequent use of the directive [but was, instead,] simply hold[ing] that the directive in the istant case lack[ed] any probative testimonial value on the issue of control or existence." *Id.* at 818 n.9 (citing United States v. Doe, 465 U.S. 605 (1984)) (citation omitted).

166 *Ghidoni*, 732 F.2d at 819.

> In this regard, the case is indistinguishable from *Fisher*, where the government was seeking records prepared by an accountant for the defendant. Because the [defendant] could not authenticate the accountant's work papers or reports by oral testimony, the Court held that the [defendant's] production of those accounts would not assist in authentication.

Id. at 818-19 (citation omitted).

the records themselves and the bank officials."[167]

This decision would allow Ghidoni to execute the directive and "still maintain that the records do not exist, that he does not control them, and that they are not authentic."[168] Therefore, "[t]hese factors demonstrate[d] the nontestimonial nature of the consent directive."[169]

In his dissent, Judge Clark analogized the execution of a consent directive to the act of providing a handwriting exemplar: in that it "provide[d] the government with no more than the truism that Ghidoni can write, and that what he has furnished is his signature."[170] He contended that both involved the act of "producing the writing,"[171] and did not find it significant that the directive authorized the release of foreign bank records to the government.[172]

The distinction lay in the use to which the directive would be put: Judge Clark stressed that, "[t]he government is seeking more than the physical characteristics of the witness' handwriting.' . . . Rather, it is seeking to obtain . . . a signature on an incriminating document.' "[173]

Although conceding that the directive did not admit "that any foreign account exists, or that any records . . . are genuine," he found that

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167 *Id.* at 819.

168 *Id.* at 810 (footnote omitted). The Court did note that "[Ghidoni's testimony] on these issues would likely run up against the clear existence of due records and the probable bank testimony that [he] controlled the accounts and the records were authentic. Nevertheless, [it concluded,] no testimonial statement in the directive contradict[ed] his . . . position regarding the accounts." *Id.* at 819 n.10.

169 *Id.* at 819 (footnote omitted). In the omitted note, the court distinguished Ghidoni's situation from that at issue in *United States v. Doe.* Whereas the *Doe* Court had the benefit of a district court's finding "as a factual matter that the . . . compelled production of records was testimonial and incriminated [,the *Ghidoni*] district court found that the directive was not testimonial." *Id.* 819 at n.11.

170 Judge Clark began his analysis by noting that although "compelling a handwriting exemplar is generally permissible [given that] the writing produced is nothing more than a nontestimonial, physical means of identification, like a fingerprint or a voice sample." *Id.* at 820 (citation omitted). There are exceptions:

> [W]hen a suspect is ordered to sign a confession or to furnish a handwriting exemplar, the focus shifts away from the act of producing the writing and toward its contents. The acts [sic] of signing a confession or providing a handwriting sample does no more than communicate the truism that the author can write and that what he has provided [is] in his handwriting. It is the communicative value of what is written above his signature that is important. Thus, coercing a suspect to evince his guilt by signing his name to the statement "I confess," compels incriminating testimony and is therefore forbidden.

Id. (citing Fisher v. United States, 425 U.S. 391 (1976))(citation omitted). *See also id.* ("The Supreme Court has made it clear that if the writing is sought only for its physical characteristics but also for its content, the fifth amendment prohibits its compulsion[.]").

171 *Id.* at 820. "Ghidoni [was] . . . ordered . . . to sign his name, [an act] which present[ed] a situation closer . . . to . . . the exemplar cases, than to the production of document cases. . . ." *Id.*

172 *Id.* at 820. *Cf. infra* pt. IV(B).

173 *Ghidoni*, 732 F.2d at 820 (quoting United States v. Mara, 410 U.S. 19, 22 (1973)).

this was "beside the point."[174]

> Ghidoni is not being asked to produce bank records, and so the testimonial aspects attendant to compelling the act of producing such records, articulated in *Doe*, are irrelevant here. We are concerned not with the act of producing records or the act of signing a consent form, but with the substance of the consent form itself, which communicates to all banks presented with the form: "I consent to have you release any account information you deem applicable to me."[175]

Judge Clark then concluded that execution of the directive "constitute[d] compelled testimony" which was incriminating "in that it furnishe[d] a link in a chain leading to procurement of the documents that the government intend[ed] to use to secure Ghidoni's conviction."[176]

The Fifth Circuit adopted the *Ghidoni* holding in *United States v. Cid*.[177] Cid appealed a district court order requiring that he comply with a grand jury subpoena "by executing a consent, directed to 'any bank or trust company at which I have a bank account,' for the production of bank records."[178] Cid's "objection [was] that the compulsion offend[ed] his [f]ifth [a]mendment privilege."[179]

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174 *Id.* at 820-21.

175 *Id.* at 821.

176 *Id.* at 821 (citing Hoffman v. United States, 341 U.S. 479 (1951)). In an earlier portion of the opinion, the judge noted that "Ghidoni [was] being ordered to sign a statement authorizing any foreign bank with which he ha[d] an account to release his records to the government upon demand, records which the government could not obtain without his 'consent.'" *Id.* at 820. The majority rejected Judge Clark's analysis (a) because they concluded that "the handwriting cases do provide significant support for our holding," and (b) because they found that there was "an even closer analogy between the act of production cases and the act of executing the consent directive. *Id.* at 819 n.12.

The Eleventh Circuit followed *Ghidoni* recently in *United States v. Lehder-Rivas*, 827 F.2d 682 (11th Cir. 1987). In that case, the government sought an order compelling Lehder-Rivas to execute a directive "authorizing the Bahamas Office of the Bank of Nova Scotia to produce . . . all documents described" in an accompanying grand jury subpoena. *Id.* at 683. The directive "included a statement that it had been executed pursuant to a court order." *Id.* After the court entered the requested order, Lehder-Rivas appealed, asserting that the execution of such directives violates the fifth amendment right against compelled self-incrimination, and that the Eleventh Circuit erred in *Ghidoni* when it held to the contrary. *Id.*

Not suprisingly, the Eleventh Circuit rejected the argument in a cursory opinion: "[W]e adhere to our conclusion in *Ghidoni* that the waiver would not admit the existence of the described accounts or transactions, or Lehder[-Rivas]'s control over them, but merely would authorize the bank to release such information if it believes . . . that . . . permission is necessary." *Id.* The court rejected Lehder-Rivas' argument that the First Circuit's decision in *In re Grand Jury Proceedings (Ranauro)*, 814 F.2d 791 (1987), required a different result. For a discussion of the *Ranauro* decision, see *supra* pt. III(B)(2).

177 767 F.2d 1131 (5th Cir. 1985).

178 *Id.* at 1132 (Cid also appealed the district court's denial of his motion to quash the subpoena in question.).

179 *Id.*

Although he conceded that the records were not privileged, Cid argued that the execution of the consent had

> testimonial consequences, in that he would be confirming . . . that he had (1) created an account or accounts revealed by the "Consent Directive" (2) at an off-shore bank, otherwise "safe" from scrutiny by the Government of the United States, and (3) had engaged in whatever transactions the records of those accounts reflected.[180]

The Fifth Circuit rejected the argument because (a) it found that "the same consent form was at issue in *Ghidoni*," and (b) it "agree[d] with that court's reasoning, which needs no repetition or enlargement."[181]

In addition to *Ghidoni*, the *Cid* court also relied upon a Second Circuit decision, *United States v. Davis*.[182] Davis was indicted and convicted on "various charges arising out of a scheme . . . which involved the payment of multi-million dollar kickbacks to executives of General Dynamics Corporation. . . ."[183] One of the issues which Davis raised in his appeal was the constitutional permissibility of "compelled consents." Five weeks before his trial began, the government issued a subpoena duces tecum to the Cayman Islands Branch of the Bank of Nova Scotia, directing the bank "to produce bank documents relating to accounts used by Davis in furtherance of his kickback and laundering operations."[184] Because the subpoena implicated the Cayman Islands statute which was at issue in *Ghidoni*, the government was concerned that Davis "would seek to prevent the Bank from obtaining an order from the Cayman Grand Court which would allow the Bank to comply with the subpoena."[185]

"Accordingly, the Government moved for an order directing Davis not to interfere . . . with the compliance efforts of the Bank and to execute a direction to authorize compliance by the Bank. . . ."[186] The dis-

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[180] *Id.*

[181] *Id.* at 1133 (citing United States v. Ghidoni, 732 F.2d 814 (11th Cir.), *cert. denied*, 105 S. Ct. 328 (1984)). The circuit reached an identical result in a companion case. *See In re* Grand Jury Proceedings, Thier, 767 F.2d 1133 (5th Cir. 1985) [hereinafter *Thier*]. "The consent form which Thier is directed to sign is virtually identical to that set forth in the opinion of this date in [*Cid*]. As in that case, we reject the [f]ifth [a]mendment claim." *Id.* at 1134.

[182] 767 F.2d 1025 (2d Cir. 1985).

[183] *Id.* at 1026.

[184] *Id.* at 1032.

[185] *Id.* "Under Cayman Law, disclosure of bank records is generally prohibited, but a customer's records may be disclosed if the customer consents or if the Cayman Grand Court orders disclosure." *Id.* (citing Cayman Confidential Relationships (Preservation) Law, discussed *supra* pt. II(A)). The government was concerned despite the fact that "the Bank and the Cayman Islands authorities were disposed to comply" with the subpoena. *Id.*

[186] *Id.* The requested order also required that Davis not " 'object, engage in litigation, or otherwise seek to delay or hinder production of documents in response to said subpoena.' " *Id.* at 1032-33.

trict court ordered Davis (a) to " 'take whatever steps [were] necessary to allow the Bank . . . to comply with the subpoena' . . . [, and (b)] to sign a form directing the Bank to produce the records."[187] The order "provided that the directive could not be used against Davis at trial either to authenticate the bank records or otherwise."[188]

"Davis signed the directive, ceased his litigation in the Cayman Islands, and disclosure was made pursuant to an order of the Cayman Grand Court."[189] After he was convicted, Davis argued that the order compelling him to execute the directive violated the fifth amendment prohibition against self-incrimination.[190]

The Second Circuit began its consideration of this argument by noting that the fifth amendment privilege "applies only when the accused is compelled to make a testimonial communication that is incriminating."[191] It found that "[s]ince the only communication which Davis himself was compelled to make was the direction to the bank, that direction is the only possible source of a [f]ifth [a]mendment violation."[192]

The court concluded that the issue was controlled by *Fisher*[193] which held that it was not a violation of the fifth amendment to require a taxpayer to produce his accountant's workpapers: "[S]ince the workpapers were not prepared by the taxpayer and contained no testimonial declaration by him, the taxpayer could not be said to have been compelled to make any testimonial communications."[194]

The *Davis* court held that this reasoning disposed of the issue: "The bank records were prepared by the bank and contained no testimonial communications by Davis."[195] It also applied *Fisher* to reject Davis' argument that the directive constituted "compelled testimonial evidence' ": "[t]he Bank voluntarily prepared these business records and thus no compulsion was present."[196]

The court qualified its holding by noting that "[e]ven though the *contents* of the bank records were not privileged, Davis' direction authorizing the disclosure of the records *might* have had communicative aspects

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187 *Id.* at 1033.

188 *Id.*

189 *Id.*

190 *Id.* Davis also argued (a) "that the records were obtained in violation of Cayman law, [and (b)] that the district court improperly ordered him to cease his Cayman Islands litigation." *Id.*

191 *Id.* at 1039 (quoting Fisher v. United States, 425 U.S. 391, 408 (1976)).

192 *Id.*

193 *Fisher*, 425 F.2d at 391. *See supra* pt. III(A).

194 *Davis*, 767 F.2d at 1039 ("In addition, since the preparation of the workpapers was wholly voluntary, there was no 'compelled' testimonial evidence." *Id.* (citing Fisher v. United States, 425 U.S. at 409-10.).

195 *Id.*

196 *Id. See also supra* note 193.

of its own."[197] It found, however, that because the district court's "carefully crafted order specifically provided that the [g]overnment could not use the directive as an admission that the bank accounts existed, that Davis had control over them, or for any other purpose," it did not constitute a testimonial communication within the compass of the privilege.[198] Neither the *Ghidoni* nor the *Cid* directive explicitly incorporated language to this effect.[199]

The Northern District of New York employed a rather different analysis to reach a similar result in *United States v. Browne*.[200] The case involved a motion to compel Browne to execute a consent directive.[201] Browne resisted, arguing that execution of the directive would violate her fifth amendment right to be free from compelled self-incrimination.[202]

After noting that "[b]ank records per se are not constitutionally protected" by that amendment,[203] the district court cited *Davis*, for the proposition that the "release authorizing the disclosure of defendants' bank accounts [might] have communicative aspects of its own which the fifth amendment would prohibit."[204] The court then cited *Ghidoni* for the subordinate proposition that "communicative aspects" exist *only* if "[a]ll three [*Fisher*] factors [are] present in the 'consent' form."[205]

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197 *Davis*, 767 F.2d at 1040 (emphasis added).

198 *Id.* "These limitations on the use of the direction obviate[d] any claim of testimonial compulsion." *Id.*

199 *See Ghidoni*, 732 F.2d at 815 n.1; *Cid*, 767 F.2d at 1132 n.1. The directives utilized in these cases did include a statement to the effect that the consent was executed pursuant to an order issued by a federal district court.

200 624 F.Supp. 245 (N.D.N.Y. 1985).

201 *Id.* at 247. Helen and Clifford Browne "were indicted for failing to disclose the existence of foreign bank accounts." *Id.* The motion to compel followed unsuccessful government efforts "to obtain records of these accounts without [the] defendants' assistance." *Id.* The records at issue were located in Switzerland and in Canada. *Id.* "The government moved to compel both defendants to sign the releases." However, Clifford Browne then died, so Helen became the sole object of the government's attention. *Id.* at 247 n.1.

202 *Id.* at 247. She also argued that the execution of release "would violate her constitutional rights under the fourth, . . . sixth and thirteenth amendments." *Id.* (footnote omitted).

203 *Id.* (citing United States v. Miller, 425 U.S. 435 (1976) and California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974)).

204 *Id.* at 248. The court also cited *United States v. Doe*, 465 U.S. 605 (1984), and *Fisher v. United States*, 425 U.S. 391 (1976), as supporting this proposition. The release in question "would [have] permit[ted] the government to obtain bank records of only those accounts over which Mrs. Browne had control either jointly or individually. It could not operate to release records of accounts over which the deceased Mr. Browne had exclusive control." *Id.* at 247 n.1. A copy of the release is appended to the decision. *See id.* at 250. The release is very similar to the directive which was at issue in *Ghidoni*; it does not, however, include a statement to the effect that it was executed pursuant to an order of a federal district court.

205 *Id.* at 248. The three *Fisher* factors are, of course, that the individual is "compelled to make a testimonial communication that is incriminating." *Fisher*, 425 U.S. at 408, *quoted in Ghidoni*, 732 F.2d at 816; *Browne*, 624 F. Supp. at 248.

With respect to the first factor, the *Browne* court found that the element of compulsion is met whenever a court order requires that an individual such as Browne sign a " 'consent' form after she has refused to do so voluntarily."[206] With respect to the second factor, it found that a directive will "be deemed testimonial" if an individual's execution of the form attested "to the bank records' existence, authenticity, or [her] control over the records."[207] The court then held that "the consent form presented by the [g]overnment" could not "be deemed testimonial" because it "was [too] broadly worded" to constitute an attestation to any of these matters.[208]

With respect to the third factor, the court felt that the issue of incrimination was "a more troubling question."[209] Although "[i]t could be said that the release [was] incriminating in that 'it furnishe[d] a link in the chain leading to the procurement of documents that the government intend[ed] to use to secure [her] conviction,' "[210] the court held otherwise:

> While a waiver . . . will lead to the production of records which the government intends to use to obtain [Browne's] conviction, this is not self incrimination. . . . [T]he consent would merely operate to "remove an obstacle" to the production of foreign bank records which obstacle is created by foreign law. . . . [T]herefore, requiring defendant to sign the proposed consent form does not violate [her] fifth amendment rights.[211]

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206 *Browne*, 624 F. Supp. at 248 (citing *Ghidoni*, 732 F.2d at 816).

207 *Id.* (citing *Doe*, 465 U.S. at 612-13 (quoting *Fisher*, 425 U.S. at 410)).

208 The consent form . . . does not state that any accounts in the name of defendant exist. Therefore, if banks produce records of accounts held in the name of defendant, the Government has not relied upon the 'truth-telling' of the defendant's signed release to demonstrate the existence of these records. . . . The release . . . does not contain an admission . . . that defendant exercises control over any of the accounts for which the Government will request the bank records. As in *Ghidoni* the release permits the banks to make their own determination of whether defendant exercises control over any accounts in the particular bank. . . .

The last element . . . is . . . authenticity. . . . [O]nly the banks can authenticate their own records; this situation is unlike those cases in which the individuals are required to produce records which they have maintained themselves. . . . Because the release is not testimonial defendant may not properly invoke the fifth amendment to refuse to sign the consent form presented by the government.

Id. at 248 (citations omitted). *See infra* pt. IV(B).

209 *Id.* at 249.

210 *Id.* (quoting Judge Clark's dissent in *Ghidoni*, 732 F.2d at 821). "Stated differently, the release allowing the banks to produce bank records of defendant's accounts may compel defendant to add to the sum total of the Government's information.' " *Id.* (quoting United States v. Fox, 721 F.2d 32, 38 (2d Cir. 1983)).

211 *Id.* at 249. (citing United States v. Quigg, Crim. No. 80-41-1, slip op. at 5 (D. Vt. Jan. 5, 1981)). In *Browne*, the court found (a) that "[a] determination of incrimination is confined to whether the communication compelled to be made by the individual is itself incriminating . . . [and (b) that because Mrs. Browne did] "not acquire any rights under foreign bank secrecy laws which

As had Ghidoni, Cid and Davis, Browne argued that the execution of the directive was incriminating because it "furnish[ed] a link in the chain leading to the procurement of" evidence which could be used to obtain a conviction. This is essentially a "but for" argument: "but for" the execution of the directive, the government would not be able to obtain the evidence necessary for a conviction.

Unlike the *Ghidoni*, *Cid* and *Davis* courts, the *Browne* court elected to reject this argument by minimizing the "but for" significance of the directive.[212] It reasoned as follows: (a) the execution of the release would allow the government to obtain documents which it could not otherwise obtain due to the operation and effects of "foreign bank secrecy laws"; (b) because U.S. courts are not bound to honor "foreign bank secrecy laws,"[213] these laws gave Browne no basis for refusing to execute the directive;[214] and (c) because Browne could not rely upon these laws as justifying her refusal to execute the directive, no fifth amendment consequences attached to prevent such an execution.

Although not styled as such, the *Browne* court's analysis is reminiscent of the "balancing test" which was discussed in part II(B) of this Article.[215] Like that test, the *Browne* court's test focuses on the extent to which a bank depositor has a cognizable privacy interest in his account records; and like that test, it rejects privacy interests created and guaranteed by "foreign bank secrecy laws" in favor of the interests of U.S. law enforcement officials.[216] The defensibility of this aspect of the *Browne* opinion is a matter which is considered in part IV(B).[217]

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are cognizable in [U.S.] courts, . . . [she could not] invoke the fifth amendment to refuse to waive these rights' by signing the proposed consent form." *Id.* (citing United States v. Payner, 447 U.S. 727, 732 n.4 (1980)). Both the second finding and the comments quoted above are predicated upon an obvious misunderstanding of the point which was at issue, i.e., whether the execution of the consent directive was a testimonial communication which "furnishe[d] a link in the chain leading to the procurement of documents that the government intend[ed] to use to secure [Mrs. Browne's] conviction". *Id.* (citing United States v. Ghidoni, 732 F.2d 819, 821 (Clark, J., dissenting)). *See infra* pt. IV(B).

212 The *Ghidoni* and *Davis* courts, of course, upheld their directives because each court found that the execution of a consent directive did not constitute "testimonial communication" within the meaning of the fifth amendment. *See Ghidoni* 732 F.2d at 818; *Davis*, 767 F.2d at 1039-40. The *Cid* court, of course, merely adopted the *Ghidoni* holding. *See Cid*, 767 F.2d at 1133. Although the *Browne* court also found that the execution of such a directive did not constitute "testimonial communication" within the meaning of that amendment, it also addressed the issue of incrimination. *See Browne*, 624 F. Supp. at 248. For a discussion of the utility of the "but for" standard in this context, see *infra* pt. IV(B).

213 *Browne*, 624 F. Supp. at 249 (citing United States v. Quigg, Crim. No. 80-41-1, slip op. at 5 (D. Vt. Jan. 5, 1981)).

214 *Id.* (citing United States v. Payner, 447 U.S. at 732 n.4 (1980)).

215 This test, of course, involves the application of § 40 of the Restatement (Second) of the Foreign Relations Law of the United States (1965). *See supra* pt. II(B).

216 *See supra* pt. II(C).

217 *See infra* note 379.

The Second Circuit added an important qualification to the use of "compelled consents" in *United States v. A Grand Jury Witness* ("*Alexander*").[218] The case arose after a former mayor of Syracuse, New York, "suspected of improperly using his office to receive kickbacks and other extortionate payments"[219] received a grand jury subpoena requiring him to execute a consent directive.[220]

After unsuccessfully moving to quash,[221] Alexander executed the directive "but only after adding the phrase '(e)xecuted under protest' above the signature line."[222] The government moved to have him held in contempt, and the district court convened a hearing on that motion.[223]

Alexander argued that his execution of the directive complied with the provisions of the district court's order in that the phrase "under protest" (a) did not diminish the effectiveness of the directive, and (b) "did nothing more than ensure that the document was not a false document" by explicitly indicating that it was the product of "compelled consent."[224] The district court disagreed, directing him "to sign the document without any limiting language"[225] and denying his request that "the document reflect that it was signed pursuant to the court's order."[226]

Alexander refused to comply and was held in contempt; he then appealed to the Second Circuit, which reversed.[227] Although rejecting

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218 811 F.2d 114 (2d Cir. 1987) [hereinafter *Alexander*].

219 *Id.* at 115.

220 *Id.* Alexander was the target of the investigation. *Id.* The directive "provided . . . that Alexander authorized any financial institution at which he had an account to disclose that information, including copies of all documents with certificates of authenticity, to any agent or employee of the [U.S.] government." *Id.* The prosecutor "frankly stated that the 'subpoena . . . [was] issued to facilitate the grand jury's securing information from certain foreign financial institutions in which [Alexander] deposited assets which are believed to be proceeds of the extortion/kickback scheme now under investigation.' " *Id.*

The directive is reproduced in the opinion; it did not indicate that it was executed pursuant to an order from a federal district court or under any other form of compulsion. *See id.*

221 "[T]he district court denied the motion and ordered Alexander to comply with the subpoena." *Id.*

222 *Id.* at 116.

223 *Id.*

224 *Id.* With regard to the latter proposition, Alexander's counsel argued that

> [w]hat this man simply said is that he would not sign something that was false. And if he signed it, without appending those words, it would be false because it speaks in terms of consent which is not his consent, he simply puts on here that fact that it is executed under protest.

Id.

225 *Id.* The court accepted the government's argument that "the added language might affect the validity of the [directive] in the eyes of foreign financial institutions and might, therefore, impede the grand jury's investigation." *Id.*

226 *Id.*

227 *Id.*

the argument that the directive contravened the fifth amendment prohibition against self-incrimination,[228] the court was intrigued by "Alexander's contention that he [was] being forced . . . to sign a patently false document."[229]

It noted that Ghidoni had advanced a similar argument: "[he] claimed 'that his signing the consent directive would constitute a due process violation by forcing him to make a false communication. He assert(ed) that his signature, evincing consent to the bank's disclosure, would be a sworn misstatement because he does not consent to disclosure.' "[230] The *Ghidoni* court rejected this argument because the directive which was at issue in that proceeding included the statement that it was "executed pursuant to that certain order of the [U.S.] District Court for the Northern District of Florida."[231]

No such statement appeared in the *Alexander* directive; indeed, the government had actively opposed its inclusion on the theory that "it represented nothing more than a back door effort to warn the banks not to comply."[232] The Second Circuit disagreed, holding that "it was improper to bring the considerable sanction of contempt to bear as part of a procedure which would conceal the true nature of the purported 'Consent Directive.' "[233]

The court did not, however, find that the impropriety rose to the level of a constitutional violation.[234] Instead, it chose to "exercise [its] supervisory power over the district courts . . . to preclude the use of this form of consent directive,"[235] holding that the directive would have been acceptable "either if it indicated that it was being executed pursuant to court order or if Alexander had been permitted to indicate that he

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228 *Id.* at 116-17. The court applied its own decision in *Davis*, and the Eleventh Circuit's decision in *Ghidoni*, to hold that the directive did not constitute "testimonial communication" within the compass of the privilege. *See id.*

229 *Id.* at 117. Alexander argued "that, without some express statement that his consent has not been voluntarily given, the document is fraudulent on its face." *Id.*

In addition to his fifth amendment argument, Alexander contended

> that he [was] being forced to sign a false document because it [did] not provide that his consent was coerced; . . . that he properly refused to respond before the grand jury because he had been subjected to illegal electronic surveillance; and . . . that the form of consent [was] deficient because it authorize[d] disclosure to any employee of the government in contravention of the general rule on grand jury secrecy codified in Fed.R.Crim.P. 6(e).

Id. at 116.

230 *Id.* at 117 (quoting *Ghidoni*, 732 F.2d at 818 n.7).

231 *See id. See also Ghidoni*, 732 F.2d at 815 n.1.

232 *Alexander*, 811 F.2d at 117. "On appeal, the government argued that the directive [was] not false because it nowhere purport[ed] to be freely executed but, instead, simply direct[ed] that it 'be construed as consent.' " *Id.*

233 *Id.*

234 *Id.*

235 *Id.* at 118.

'[e]xecuted [the directive] under protest.' "[236]

Because this holding was predicated upon the court's supervisory powers, its precedential effect in other circuit courts is uncertain. At a minimum, however, it permits the argument that, absent either of the "indications" described above, a consent directive "offends basic precepts of honest behavior by invoking the district court's imprimatur on a document that would be misleading."[237]

The Second Circuit returned to this issue several months later in an appeal which ensued after a district court held two grand jury witnesses in contempt for refusing to execute consent directives.[238] The witnesses argued that *Davis* and *Alexander* "conflict[ed]" with the Supreme Court's holding in *United States v. Doe*:[239]

> Appellants suggest that the determination of the fifth amendment question in those decisions rested on the fact that the government was precluded from using the directive at trial as an admission against the signatory of the directive. Appellants contend that we recognized in those cases that the directives were both testimonial and incriminating, and that by sanctioning a district court order precluding admission of the directives into evidence, we were approving a de facto use immunity—a practice forbidden by *United States v. Doe*. . . .[240]

The Second Circuit rejected their argument after "clarify[ing] the meaning of [its] prior decisions."[241] It began by reviewing the elements necessary to establish a fifth amendment violation,[242] and then consid-

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236 *Id.*

237 *Id.* at 117-18. After stating that it had chosen to exercise its supervisory power over the district courts to prevent such an outcome, the court noted that "[i]n so doing, despite our distaste for its tactics here, we do not attempt to control the executive branch's behavior . . . but only that of the district courts when requested to intervene to enforce this disingenuous practice." *Id.* at 118 (citing United States v. Payner, 447 U.S. 727, 737-38 (1980) (Burger, C.J., concurring)).

238 *See In re* Grand Jury Subpoena, 826 F.2d 1166, 1167 (2d. Cir. 1987) [hereinafter *Contemnors*].

239 *Id.* at 1168 (citing United States v. Doe, 465 U.S. 605 (1984)). *Doe*, of course, rejected "the government's proposed doctrine of constructive use immunity." 465 U.S. at 616. *See also supra* pt. III(A).

240 *Contemnors*, 826 F.2d at 1170. The argument was predicated upon the qualification which was appended to the *Davis* holding, i.e., that "Davis' direction authorizing the disclosure of the records *might have had* communicative aspects of its own." *Davis*, 767 F.2d at 1040 (emphasis added). The *Davis* opinion resolved this issue by holding that "any claim of testimonial compulsion" on Davis' part was "obviated" by the district court's "carefully crafted order" which limited the use that could be made of the directive. *See id. See also supra* note 198 and accompanying text.

The district court in the *Contemnors* proceeding ordered the witnesses to execute directives which had been modified to specify "that they were being executed in compliance with a court order." *Contemnors*, 826 F.2d at 1167. The order also provided that "the directives could not be used as an admission against appellants in any subsequent trial." *Id.*

241 *Contemnors*, 826 F.2d at 1168.

242 "To establish a fifth amendment violation, appellants must . . . demonstrate the existence of three elements: 1) compulsion, 2) a testimonial communication, and 3) the incriminating nature of

ered whether the execution of consent directives "constitutes testimonial self-incrimination."[243] It resolved this issue by utilizing the *Alexander* and *Ghidoni* holdings with regard to determining whether a particular act is "both 'testimonial' and 'incriminating' for purposes of applying the [f]ifth [a]mendment."[244]

Fisher enunciated the standard to be used in making such a determination. Acts will be deemed to be "testimonial" and "incriminating" to the extent that they represent admissions of the existence, possession or authenticity of certain documents.[245] The *Contemnors* court announced that, in both *Davis* and *Alexander*, it had "adopted the Eleventh Circuit's approach toward resolving these questions as set forth in *United States v. Ghidoni*."[246] This holding finally and firmly committed the circuit to the *Ghidoni* rationale. The execution of "compelled consents" is not a "testimonial assertion" and is not, therefore, encompassed by the fifth amendment protection against self-incrimination.[247]

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that communication." *Id.* (citing In re N.D.N.Y. Grand Jury Subpoena, 811 F.2d 114, 116 (2d Cir. 1987), which, in turn, cited United States v. Browne, 624 F. Supp. 245, 248 (N.D.N.Y. 1985), as support for this proposition).

243 *Id.* at 1168-69. According to this opinion, *Davis* "did not . . . decide . . . whether the communicative aspects of [such] directive[s] were either testimonial or incriminating in nature." *Id.* at 1169. "[W]e rejected [Davis'] fifth amendment challenge because we found that any potential fifth amendment problems were obviated by the fact tht the district court precluded the government from using the directive as an admission at trial." *Id.* (citing United States v. Davis, 767 F.2d 1025, 1040). *See supra* notes 192-98 and accompanying text.

244 Fisher v. United States, 425 U.S. 391, 410 (1976). *See Contemnors*, 826 F.2d at 1169-70.

245 *Fisher*, 425 U.S. at 410-13. *See supra* notes 144-46 and accompanying text.

246 *Contemnors*, 826 F.2d at 1169. According to this court, *Ghidoni* "likened [the execution of a consent directive] to the situation presented in *Doe* and *Fisher*, where an individual was compelled to produce . . . documents himself." *Id.* The *Contemnors* court then described "the Eleventh Circuit's approach" to these issues.

> The *Ghidoni* court . . . examined the directive to determine whether it contained any testimonial assertion regarding the documents sought from the banks. The court concluded that the directive was 'devoid of any testimonial aspects,' . . . after it found that 'nothing in the directive implie[d] that [bank] accounts exist,' and that it contained no statements regarding possession or control over such accounts, and that it could not be used to authenticate any records obtained.

Id. at 1169-70 (citations omitted). The Second Circuit's characterization of *Ghidoni* continued with the following comments.

> The court thus concluded that compelled execution of the directive would not violate the privilege against self-incrimination because the directive itself was not testimonial in nature. . . . In upholding the compelled execution of the directive, the court further observed that the defendant was only being compelled to "waive a barrier [i.e., foreign states' confidentiality laws] to permit the bank to produce documents—an *act* which it concluded provided no testimonial assertions."

Id. at 1170 (citations omitted).

247 We . . . hold that because the directives here contain no testimonial assertions, the district court orders compelling appellants to sign the directives provide no basis for a fifth amendment violation. The directives here, as in *Ghidoni*, do not contain any assertions by appellants regarding the existence of, or control over, foreign bank accounts. They author-

After announcing this commitment,[248] the Second Circuit rejected the "de facto use immunity" argument.[249] According to this portion of the opinion, the proviso that the directives could not be used as an admission at trial was "merely [a] ruling on evidentiary questions relating to materiality, relevance, prejudice, etc."[250]

2. Fifth Amendment Violation

Three district court opinions have rejected the *Ghidoni* rationale.[251] A Texas ruling issued after the government moved to compel "Texas Doe" to execute a "compelled consent."[252]

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ize disclosure of records and information only if such accounts exist. We also agree with the *Ghidoni* court's conclusion that the directives could not be used to authenticate any bank records obtained.

Id.

As noted above, the court began its consideration of this issue by announcing that *Davis* did not "decide whether the communicative aspects of [that] directive were either testimonial or incriminating in nature." *See id.* at 1169. *See also supra* note 243. It is difficult to reconcile this statement with the court's subsequent observation that it had "adopted" the *Ghidoni* rationale "[i]n both *Davis* and *In re N.D.N.Y. Grand Jury Subpoena.*" *Contemnors*, 826 F.2d at 1169.

248 The court did, however, note that "[t]he *Ghidoni* decision is not without criticism," and proceeded to analyze the First Circuit's decision in *In re Grand Jury Proceedings (Ranauro)*, 814 F.2d 791 (1st Cir. 1987), which is considered *infra* pt. III(B)(2). *See Contemnors*, 826 F.2d at 1170. The court concluded, however, that "[w]hile we see some merit in the First Circuit's approach, we are constrained here to apply our precedent in [*Alexander*], and follow the analysis set forth in *Ghidoni*." *See id.* at 1170.

249 *See Contemnors*, 826 F.2d at 1170. *See also supra* note 240 and accompanying text.

250 *Contemnors*, 826 F.2d at 1171.

> [S]ince the directives contain no statements regarding [the] existence of, or control over, any accounts, they should be excluded from evidence because they lack any probative value. . . . We conclude . . . that, because the directives lack any probative testimonial value on the issue of existence or control [of the records at issue], . . . the district court properly excluded them from evidence.

Id. (citations omitted)(citing *Ghidoni*, 732 F.2d at 818, n.9). This aspect of the decision is explicated in more detail in a concurring opinion written by Judge Newman. *See id.* at 1171-75. Judge Newman found that this interpretation of the *Davis* holding as applied by the district court in the *Contemnors* proceeding, was supported by the holding's citation to a note in the *Ghidoni* opinion. The note "explicitly pointed out . . . that 'use' immunity was not being conferred . . . and that the 'consent' directive was deemed not to be testimonial because it 'lack(ed) any *probative* testimonial value on the issue of control or existence (of the bank records).' " *Id.* at 1172 (quoting *Ghidoni*, 732 F.2d at 818 n.9 (emphasis added in concurring opinion).

251 *In re* Grand Jury Investigation, Doe, 599 F. Supp. 746 (S.D. Tex. 1984) [hereinafter: *Texas Doe*]; United States v. Pedro, 662 F. Supp. 47 (W.D. Ky 1987); Senate Select Comm. on Secret Military Assistance to Iran v. Secord, 664 F. Supp. 562 (D.D.C.).

252 *Texas Doe*, 599 F. Supp. at 746. *See also supra* pt. III(B)(1).

The directive would have "allow[ed] the foreign banks to supply the government with bank records, . . . consequently circumvent[ing] the foreign government's secrecy laws." *Texas Doe*, 599 F.Supp. at 746. "Pending before the Court is the Government's Motion to Compel John Doe to Consent to Disclosure of Records by the Barclays Bank International, the Bank of Nova Scotia, and the Bank of Bermuda." *Id.* One of the consent forms which was at issue in the proceeding is reproduced in footnote 4 of the opinion. *See id.* at 748 n.4. The form did not include statements to

Texas Doe contended that the consent "would violate his fifth amendment privilege in that it would compel him to perform a testimonial act within the meaning of the prior case *United States v. Doe*."[253] The government countered by arguing that the consent (a) "was analogous to a compelled handwriting exemplar, which was approved by the Supreme Court in *Gilbert v. California*,"[254] or (b) "would merely remove an obstacle to the production of bank records placed there by the respondent."[255]

The court rejected both arguments, holding that the directive constituted a testimonial, incriminating communication under the standard enunciated in *Fisher*.[256] Its holding was predicated upon findings that execution of the directive would admit (a) that certain accounts existed,[257] and (b) that Doe "exercised signatory authority over such accounts."[258] These findings derived, at least in part, from the fact that

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the effect (a) that it was executed pursuant to a court order, and/or (b) that it could not be used against Doe at a trial on the merits, should an indictment be returned against him. *See id. See also supra* pt. III(B)(1).

253 *Texas Doe*, 599 F. Supp. at 747. *See supra* pt. III(A).

254 *Texas Doe*, 599 F. Supp. at 747 (citing Gilbert v. California, 388 U.S. 263 (1967)). *See supra* pt. III(B)(1) (for a discussion of the handwriting exemplar issue).

255 *Texas Doe*, 599 F. Supp. at 747. *See supra* pt. III(B)(1) (for the source of the "merely remove an obstacle" theory).

256 *Texas Doe*, 599 F. Supp. at 747-48 (citing Fisher v. United States, 425 U.S. 391, 410-11 (1976)). It appears that this court merged *Fisher*'s discrete inquiries into the "testimonial" and "incriminating" aspects of a communication into a single inquiry:

> Whether a testimonial communication exists must be determined by the facts of each case. . . . *Moreover, if the act of producing supplies a necessary link in the government's evidentiary chain, the burden of establishing that the act is a compelled testimonial communication may be satisfied.* In other words, "does it confirm that which was previously unknown to the government?"

Id. (emphasis added) (citing *Fisher*, 425 U.S. 391, and quoting United States v. Schlansky, 709 F.2d 1079, 1084 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984)).

For a discussion of *Fisher*, see *supra* pt. III(A). For a discussion of the application of the *Fisher* standard in cases which have held that the execution of "compelled consents" does not fall within the prohibitions of the fifth amendment, see *supra* pt. III(B)(1). For a discussion of *Schlansky*, see the treatment of United States v. Pedro, 662 F. Supp. 47 (W.D. Ky, 1987) *infra* notes 262-75.

257 *Texas Doe*, 599 F. Supp. at 748. This finding is accompanied by the following footnote: "*Contra United States v. Ghidoni*, 732 F.2d 814, 817 n.4 (11th Cir. 1984). This Court has determined that the proposed forms in this case contain incriminating testimony in the contents." *Id.* at 748 n.5.

258 *Id.* at 748. This finding was accompanied (a) by the finding that the execution of the consent would result in the delivery of "records of respondent's accounts or accounts he controlled," and (b) by the following footnote:

> In a subsequent proceeding, the government could argue that since respondent exercised authority over the accounts listed, he must have guilty knowledge of the contents. A witness cannot be compelled to perform a testimonial act that would entail admission of knowledge of the contents of potentially incriminating documents.

Id. at 748 n.6 (citation omitted). This passage concludes with a citation to *In re Grand Jury Subpoenas Duces Tecum, Dated June 13, 1983, and June 22, 1983*, 722 F.2d 981, 987 (2d Cir. 1983). In this

Doe had not been indicted: "[B]y compelling [him] to execute the proposed consent forms, John Doe may be providing the government with the incriminating link necessary to obtain an indictment."[259] In a reference to the balancing test discussed in part II(B), the court noted that "[i]f . . . the government requires the foreign bank records, case law has afforded another possible remedy."[260]

This decision was issued prior to the Fifth Circuit's decision in *Cid*, discussed in part III(B)(1). Since *Cid* adopted the *Ghidoni* rationale, and since *Texas Doe* was predicated upon the rejection of that rationale, one can only conclude that the latter decision retains little, if any, precedential value.[261]

In *United States v. Pedro*,[262] *Ghidoni* was rejected again. This ruling issued on a Petition to Enforce an I.R.S. summons seeking to compel Pedro to execute directives authorizing " 'any bank or trust company' to supply the I.R.S. with bank records not otherwise obtainable."[263]

Pedro argued that the consents violated his fifth amendment privilege against self-incrimination.[264] The court agreed,[265] finding that "[t]he principal question" was whether the directives constituted a testimonial communication:[266] "[T]he answer . . . 'depends on whether the

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decision, the Second Circuit held that a grand jury witness had "advanced a colorable claim" that his production of certain documents would constitute an incriminating act; the witness contended that production would establish his possession of the documents which, in turn, would permit "the government to argue . . . that his removal of the documents from [a] company's files amounted to a tacit admission that he had knowledge of their incriminating contents. . . ." *Id.* at 987. The Second Circuit remanded the matter to the district court for a factual determination as to whether the witness' contention was well-founded. *See id.*

259 *Texas Doe*, 599 F. Supp. at 748.

> While the government appears to have some evidence which has been tendered for this Court's review, the government apparently does not have enough evidence to obtain an indictment. The government admits that the grand jury is currently investigating [Doe] and others for various statutory violations.

Id. The court then commented that the relief which the government sought was " 'precisely [the] sort of fishing expedition that the fifth amendment was designed to prevent.' " *Id.* (quoting United States v. Fox, 721 F.2d 32, 38 (2d Cir. 1983)). This comment is followed by a citation to *Bank of Nova Scotia*, 722 F.2d 657 (11th Cir. 1983), *after remand*, 740 F.2d 817 (11th Cir. 1984), which involved the application of the Restatement "balancing test" discussed *supra* pt. II(B).

260 *Texas Doe*, 599 F. Supp. at 748 n.7. *See also supra* note 259; *infra* pt. IV.

261 It was, however, cited as support for the holding in *United States v. Pedro* discussed *infra*. *See infra* notes 262-75 and accompanying text.

262 662 F. Supp. 47 (W.D. Ky. 1987).

263 *Id.* at 48. The petition was filed by the IRS and the Department of Justice. *Id.*

264 *Pedro* "assert[ed] that compelling him to sign the consent directives [was] compelling him to testify that the bank records exist[ed], [were] authentic, and that he controlled them." *Id.* at 48. This, of course, was an invocation of the *Fisher* standard for determining whether or not a particular act is "testimonial" and "incriminating" within the compass of the fifth amendment. *See supra* pt. III(A).

265 *Pedro*, 662 F. Supp. at 49.

266 *Id.* at 48.

very act of production supplies a necessary link in the evidentiary chain. Does it confirm that which was previously unknown to the government; e.g., the existence or location of the materials?' "[267]

The court concluded that the directives were testimonial because they "would 'confirm that which was previously unknown to the government,' " thereby "supply[ing] a necessary link in the evidentiary chain."[268] The *Pedro* court distinguished *Cid*[269] and *Ghidoni*[270] on the theory that the consents which were at issue in those cases "were limited to named banks": "[i]n the present case, the consent directives are not limited to named banks[271] and the government has effectively admitted that it does not know whether [Pedro], in fact, had foreign bank accounts."[272]

It quoted extensively from the *Texas Doe* opinion and followed that decision in one particular respect: "[Pedro] has not been indicted as the government apparently does not have enough evidence to obtain an indictment";[273] it concluded, therefore, that "compelling [him] to execute the proposed consent forms could provide the government with the incriminating link necessary to obtain an indictment."[274]

After the government moved to reconsider, the court affirmed its decision in a brief addendum which is appended to the original published opinion.[275] The only distinguishing feature of the addendum is that it cites the *Secord*[276] and *Ranauro*[277] opinions as additional support for the position which it took with regard to "compelled consents."[278] Both

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267 United States v. Schalansky, 709 F.2d 1079, 1084 (6th Cir. 1983), *quoted in Pedro*, 662 F. Supp. at 48 ("*Schlansky* . . . clearly suggests that if the existence or location of the materials is unknown and compelled production confirms the existence or location of the material is issue, then the art (*sic*) of production may invoke testimonial communication.").

268 *Pedro*, 662 F. Supp. at 48. For a further discussion of this issue, see *infra* pt. IV(B).

269 United States v. Cid, 767 F.2d 1131 (5th Cir. 1985). *See supra* pt. III(B)(I).

270 United States v. Ghidoni, 732 F.2d 1131 (5th Cir. 1985). *See supra* pt. III(B)(1).

271 *Pedro*, 662 F. Supp. at 49. The *Pedro* court also distinguished *United States v. Davis*, 767 F.2d 1025 (1985), because "the consent directive [at issue therein] provided that it could not be used as an admission to authenticate records." *Id.* at 49. *See also supra* pt. III(B)(1).

272 *Pedro*, 662 F. Supp. at 49. Because the government had "effectively admitted" that it was uncertain as to the existence of such accounts, the court concluded that "compulsion of the proposed consent directives would [therefore] supply a necessary link in the evidentiary chain" by confirming the existence or nonexistence of those accounts. *Id.*

273 *Id.*

274 *Id.*

> As Judge Bue stated [in *Texas Doe*]: "This is precisely [the] sort of fishing expedition that the fifth amendment was designed to prevent.' " *Texas Doe*, 599 F. Supp. at 747 (quoting *United States v. Fox*, 721 F.2d 32, 38 (2d Cir. 1983)).

Id. at 49. *See supra* notes 259-60 and accompanying text. *See also infra* pt. IV(B).

275 *See Pedro*, 662 F. Supp. at 49-50.

276 Senate Select Comm. v. Secord, 664 F. Supp. 562 (D.D.C. 1987).

277 *In re Grand Jury Proceedings (Ranauro)*, 814 F. 2d 791 (1st. Cir. 1987).

278 *See Pedro*, 662 F. Supp. at 49-50.

opinions are discussed immediately below.

In *Secord* a District of Columbia court rejected *Ghidoni*[279] after a Senate Committee[280] sought to compel General Richard Secord to execute a "compelled consent."[281] The court held that execution of the consent would violate Secord's "[f]ifth [a]mendment privilege against compelled self-incrimination".[282] The opinion began by noting that the privilege "applies only when the accused is compelled to make a testimonial communication that is incriminating."[283] Because compulsion was not an issue,[284] the court turned to "the testimonial nature of the communication and its incriminating effects."[285]

According to the Committee, "[b]ecause the directive contain[ed] a disclaimer by which Secord would expressly state that [it] 'shall not be construed as admission that I am a principal of, or have any authority with respect to, any of the listed entities or their records or accounts,' all

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279 *See Secord*, 664 F. Supp. 562.

280 The committee was, of course, the "Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition" [hereinafter the Committee]. *Secord*, 664 F. Supp. at 563. The Committee sought the proposed order under the aegis of 28 U.S.C. § 1364(b), which provides that "[u]pon application by the Senate or any authorized committee or subcommittee of the Senate, the district court shall issue an order to [a] . . . person refusing . . . to comply with a subpoena . . . of the committee . . . requiring such . . . person to comply forthwith." *See id.* at 563 n.1.

281 *Id.* at 563. The directive would have allowed "any bank holding an account from which he is authorized to draw to disclose information and documents to the Committee pertaining to such account." *Id.* The application came after Secord "refused to comply with an Order of the Committee to sign the directive." *Id.* at 563-64. This Order issued after "[t]he Tower Commission reported . . . that General Secord . . . was integrally involved in both the sale of arms to Iran and funnelling of millions of dollars in profits to the Nicaraguan rebels, known as contras." Shenon, *U.S. Judge Backs Secord Bank Secrecy*, N.Y. Times, Apr. 17, 1987, at 3, col. 3. Senate investigators believed that "General Secord controlled the foreign accounts" in which the Iran-contra funds were secreted. *Id.* The accounts at issue were primarily located in Switzerland. *See, e.g., Will Zurich Money Handlers Ignore Senate Panel's Request?*, Nat'l L.J., Apr. 27, 1987, at 29, col. 1 ("Senate investigators believe the Swiss bank records of retired Air Force Gen. Richard V. Secord are critical to learning what happened to funds diverted from the Iran arms sales.").

282 *Secord*, 664 F. Supp. at 566. In addition to contending that the consent would violate his right against compulsory self-incrimination, Secord also argued that the forced execution of the directive would violate (a) "his [f]ifth [a]mendment Due Process rights . . . [and (b)] his rights under the [f]irst [a]mendment." *Id.* at 564. He also maintained that "an extant treaty between the United States and Switzerland regarding the disclosure of information in the context of criminal investigations and prosecutions [made] the Committee's application inappropriate." *Id.* (footnote omitted) (citing Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T 2019, T.I.A.S 8302.) "Because the Court . . . hold[s] that it would violate Secord's [f]ifth [a]mendment privilege against compelled self-incrimination to order him to sign the directive, his other contentions shall not be addressed." *Secord*, 664 F. Supp. at 564.

283 *Secord*, 664 F. Supp. at 564 (quoting Fisher v. United States, 425 U.S. 391, 408 (1976)). *See supra* pt. III(A).

284 *Secord*, 664 F. Supp. at 564. This conclusion was based upon the fact that "the Committee [sought] an Order of the Court forcing Secord to choose between signing the directive or suffering the penalties of civil contempt including possible imprisonment." *Id.*

285 *Id.*

of the testimonial elements of production . . . [were] removed."[286] The court found otherwise.

> Although the obtainment of documents is the Committee's goal, it is not only the testimonial aspects of producing the documents which are in question here. . . . By characterizing the directive as a tool to obtain unprotected bank records, the Committee likens the signing of it to the preparation of a handwriting exemplar, which is clearly non-testimonial. . . . The difference, however, is that the directive's *content* is what the Committee needs, not a sample of Secord's handwriting. . . . By signing the directive, Secord would be testifying just as clearly as if he were forced to verbally assert his content.[287]

Because it found that the directive was a testimonial communication within the compass of the fifth amendment, the court proceeded to the third, and final, *Fisher* element: whether the communication was incriminating.[288] It found that this element, too, was present.[289] The decision

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[286] *Id.* at 565. The disclaimer was designed to defeat the application of the *Fisher* test for the presence of "testimonial" and "incriminating" assertions. *See id.*; *supra* pt. III(A).

The Committee's contention was based upon "an analogy . . . to cases in which documents are sought directly from individuals in possession of them." *Secord*, 664 F. Supp. at 564. "In [the latter instance], the Supreme Court has held that the [f]ifth [a]mendment may attach to the mere production of the documents if there is a testimonial aspect to the production." *Id.* at 564-65; *see also id.* at 565 (citing *Fisher* and *Texas Doe*, discussed *supra* pt. III(A)).

[287] *Secord*, 664 F. Supp. at 565 (citing Gilbert v. California, 388 U.S. 263 (1967) and *In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791 (1st Cir. 1987)) (emphasis in original). The reference to "unprotected bank records" was followed by the observations (a) that Swiss law "require[s] a bank to obtain the consent of its customers before releasing their records . . . [and (b)] that [Secord's] protests would be of no avail if the Committee had subpoenaed a bank in the United States." *Id.* at 565 (footnote omitted).

The court also noted that the directive was "false as far as Secord [was] concerned" in that he "vigorously contest[ed] the disclosure of his bank records." *Id.* at 565. The Committee had argued that the directive was not false given that it stated (a) "I direct" rather than "I consent," and (b) "that Secord was compelled to sign it." *Id.* at 565 n.4. The court concluded that "[a]lthough these statements of fact [were] true, the intention and language of the directive [made] it clear that it [was] to be 'construed as consent' on the part of Secord." *Id.* For the Second Circuit's position on this issue, see United States v. Davis, 767 F.2d 1025 (2d Cir. 1985); *infra* pt. IV(B).

[288] *See supra note* 284 and accompanying text. *See also* supra pt. III(A).

[289] "The privilege . . . not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.' " *Secord*, 664 F. Supp. at 566 (quoting Hoffman v. United States, 341 U.S. 479, 486 (1950) (citing Blau v. United States, 340 U.S. 159 (1950))). "To deny a claim of privilege on the ground that the communication sought would not incriminate the witness, a trial judge must be '*perfectly clear*, from a careful consideration of all the circumstances in the case, . . . that the answer[s] *cannot possibly* have such tendency to incriminate.' " *Id.* at 565-66 (quoting *Hoffman*, 341 U.S. at 488 (quoting Temple v. Commonwealth, 75 Va. 892, 898 (1881))) (emphasis in original).

> The Committee . . . seeks to use the consent directive to obtain Secord's foreign bank records for use in its investigation into his allegedly criminal activities. The Committee can only receive the records . . . if the . . . 'consent' is adjudged to satisfy foreign bank secrecy law. The links in the chain leading to the potentially incriminating bank records are clear,

was not appealed.[290]

The First Circuit is the only circuit to have rejected *Ghidoni*; the rejection came in *Ranauro*,[291] which, like all of the cases considered in this section, involved an appeal "from a district court order holding [an individual] in contempt for refusing to sign a 'Direction and Consent' form."[292] Like the defendants in all of those cases, Ranauro argued that executing the directive "would amount to compelled self-incriminating testimony" in violation of the fifth amendment. Unlike the Second, Fifth and Eleventh Circuits, the First Circuit agreed.[293] It began as those circuits did, by applying the *Fisher* calculus as to when the privilege applies,[294] and immediately concluded that compulsion was not an issue.[295] It then considered the remaining issue: "whether [a] signed consent form is a testimonial communication within the scope of the privilege."[296]

After noting that the resolution of this issue "depend[s] upon the facts and circumstances of the particular case,"[297] the court found that the consent directive was such a communication.

> [T]he carefully drafted statement—"I consent to the production of records in my name, if such records exist"—does not itself assert the existence of any bank records in Ranauro's name. Nor does it admit the authenticity of or Ranauro's control over any records which might

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> the first link being the signing of the directive.... The court would be completely ignoring reality if it were to say that Secord's signature on the consent decree were not potentially incriminating.

Secord, 664 F. Supp. at 566 (citation omitted). The omitted citation is to the *Ranauro* decision, which is discussed below. *See supra* notes 224-29 and accompanying text. In an omitted portion of the passage which is quoted above, the court noted that "[a]lso possible, albeit unlikely, is the potentially incriminating use of the consent directive to authenticate the bank records produced in response to it." 664 F. Supp. at 566. The court indicated that its holding was predicated upon the fact that the directive included "[n]ot only ... the equivalent of the question, 'Do you consent?' ... [but] also the affirmative answer in the form of the 23 lines of the directive." *Id. See also infra* pt. IV(B).

290 *See Secord*, 664 F. Supp. 562.

291 814 F.2d 791 (1st. Cir. 1987).

292 *Id.* at 792. The individual in this instance was William A. Ranauro, "who [was] being investigated by a grand jury for possible reporting or currency violations." *Id.* The consent directive "would [have] authorize[d] a Singapore bank to release any records pertaining to accounts or transactions, if any," which Ranauro had had with that institution. *Id.* "Foreign bank secrecy law impede[d] the United States from obtaining the records unless Ranauro sign[ed] the form." *Id.*

293 *Id.* at 793-96. The court reversed the contempt citation which had been entered against Ranauro, vacated the order requiring him to execute the consent directive and remanded the matter for proceedings not inconsistent with its holding. *Id.* at 796.

294 *See supra* note 283 and accompanying text; *see also supra* pt. III(A). For the court's application of *Fisher*, see *Ranauro*, 814 F.2d at 792-93.

295 *Ranauro*, 814 F.2d at 792 ("It is clear that the district court's order forcing Ranauro to choose between signing the consent form and the penalty of contempt constitutes compulsion within the meaning of the fifth amendment.").

296 *Id.* at 792.

297 *Id.* at 793 (citing Fisher v. United States, 425 U.S. 391, 410 (1976)).

> be produced by the bank. *It does, however, admit and assert Ranauro's consent. The fact of Ranauro's consent is potentially incriminating, for it could be used, before the grand jury or at trial, to prove the ultimate facts that accounts in Ranauro's name existed or that Ranauro controlled those accounts.*[298]

Although it held that "the content of the testimonial and incriminating consent form . . . falls within the scope of the privilege,"[299] the court also offered an alternative rationale for refusing to require Ranauro to execute the consent.

> We also believe that we are justified in grounding our judgment upon our supervisory powers over the administration of criminal justice within the federal courts of our circuit. . . . Even if the consent form . . . were not, by itself, to be considered direct testimony by Ranauro of his control over whatever bank accounts are produced as a result of his execution of the form, it so closely approximates such testimony that we believe its compelled creation and subsequently incriminating use would violate not only the values underlying the fifth amendment but also the essence of our accusatorial system of justice.[300]

The court invoked *Davis* and *Alexander* as additional support for this aspect of the holding:[301] it was "troubled" because the directive did not "indicate that it [was] being executed under the compulsion of a court order,"[302] and then found that, while the omission did not constitute a due process violation,[303] it was sufficiently egregious to preclude execution of the directive "under penalty of contempt."[304] The opinion distin-

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298 *Id.* at 793 (emphasis added). For the standard which the court is applying in this passage, see *supra* pt. III(A). The court went on to offer the following scenario:

> Suppose that at trial the government were to introduce bank records produced in response to a subpoena that had been accompanied by the consent form and that it was not apparent from the face of the records or otherwise how Ranauro was linked to them. Suppose also that the government then introduced the subpoena and consent form, and a government witness testified that the bank records were received in response to the subpoena and consent form. Would not the evidence linking Ranauro to the records be his own testimonial admission of consent? We believe it would.

Id. at 793.

299 *Id.* at 794.

300 *Id.* (citations omitted) (citing Cupp v. Naughten, 414 U.S. 141, 146 (1973); Murphy v. Waterfront Commission, 378 U.S. 52, 91 (1964) (Harlan, J., concurring) and McNabb v. United States, 381 U.S. 332, 340 (1942)).

301 *See Ranauro*, 814 F.2d at 795.

302 *Id.* at 795. The directive is reproduced in the opinion. *See id.* at 796 (app.).

303 *Id.* at 795. The court also rejected Ranauro's argument that "in signing the form, [he] would be making a willful false statement in violation of Federal law." *Id. See Alexander*, 811 F.2d at 117 (for the court's position on this issue). *See also supra* notes 224-29 and accompanying text.

304 *Ranauro*, 814 F.2d at 795. This is perfectly consistent with the *Alexander* court's holding. *See, e.g., Alexander*, 811 F.2d at 117-18 ("While we have noted that enforcement of this directive does not rise to a constitutional violation, it nevertheless offends basic precepts of honest behavior by

guishes *Ghidoni* and *Cid* on the basis that "the directives involved in those cases . . . indicated that they were executed under court order."[305]

Having made that distinction, however, the court cautioned that this was not the *sole* predicate for its holding: "[W]e disagree with the *Ghidoni* court's conclusion that the consent directive contained no testimony relevant to the questions of existence of accounts in the witness's name or of control over those accounts."[306] The court then reiterated that a consent directive *is* "a testimonial assertion of consent."[307]

It also took issue with *Ghidoni*'s assertion that "the non-testimonial nature" of consent directives is illustrated by the fact that a witness who is compelled to execute such a directive "can still maintain that the records do not exist, [and] that he does not control them."[308] The First Circuit found this error onerous because "once Ghidoni signed the consent form, he could no longer argue that he did not consent to the release of the accounts."[309]

The opinion also takes issue with a dissent authored by Judge Breyer.[310] The dissent argues that consent directives do not constitute "testimonial assertions" because (a) the process of executing a directive is functionally indistinguishable from the process of supplying a physical exemplar,[311] and (b) one cannot "lie or commit perjury either by signing

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invoking the district court's imprimatur on a document that would be misleading."). *See also supra* notes 224-29 and accompanying text.

305 *Ranauro*, 814 F.2d at 795. For a discussion of *Ghidoni* and *Cid*, see *supra* pt. III(B)(1).

306 *Ranauro*, 814 F.2d at 795 (citing *Ghidoni*, 732 F.2d at 818). *See supra* pt. III(B)(1).

307 *Ranauro*, 814 F.2d at 795. "Though the assertion of consent would not itself have established the ultimate facts of existence or control, it would have been compelled testimony that could have furnished a link in the chain of evidence needed to prove those facts." *Id.* at 796 (citing Hoffman v. United States, 341 U.S. 479, 486 (1951); *In re* Kave, 760 F.2d 343 (1st Cir. 1985)).

308 *Ranauro*, 814 F.2d at 796 (quoting *Ghidoni*, 732 F.2d at 819).

309 *Id.* at 796. "The admission of consent *would* be contrary to the position that the accounts did not exist and that he did not control them, for it could be used as a link in the chain proving both their existence and his control over them." *Id.*

310 *Id.* at 794.

311 *Id.* at 797 (Breyer, J. dissenting).

> Ranauro's position is similar to that of a suspect compelled to stand in a lineup, to give a handwriting or blood sample, to speak lines, or to put on clothing. . . . In each of these instances a person is compelled to provide possibly incriminating evidence, but is *not* asked to make a (potentially false) assertion.

Id. (citations omitted). Judge Breyer contended that the majority erred in concluding that the directive constituted an assertion because it permitted the inference that the records which it produced "belonged" to Ranauro: "[T]he inference . . . would not depend upon the jury's belief in the truth of Ranauro's 'assertion' of consent. Rather, the inference would depend upon the non-assertive fact that Ranauro placed his signature at the bottom of a consent form." *Id.*

According to Judge Breyer, the circumstances surrounding Ranauro's placing his signature at the bottom of a consent form are

> no more relevant than whether a suspect believes the truth of the words he speaks for purposes of voice identification. In fact, the inference a jury might draw here is rather like

or by not signing the form."[312] The majority rejected both propositions, asserting that (a) "the risk of perjury is not always . . . [a] "prerequisite to invocation of the privilege,"[313] and (b) a consent directive "can[not] be likened to a physical exemplar."[314]

IV. "FOREGONE CONCLUSIONS": AN ANALYSIS FOR DETERMINING WHEN THE EXECUTION OF A "COMPELLED CONSENT" IS ENCOMPASSED BY THE PROTECTIONS OF THE FIFTH AMENDMENT

The cases considered in part III(B) can be reconciled[315] by means of an analysis derived from (a) a proposition which was enunciated in *Fisher*[316] and (b) an observation which appears in *South Dakota v. Neville*.[317] Part IV(A) examines the proposition and the observation, while

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the one it might draw on hearing that a key taken from an arrested suspect opened a safe deposit box containing contraband. The inference simply does not depend on the truth of any assertion Ranauro has made.

Id. at 798.

312 *Id.* at 797. This comment followed observations (a) that "a fundamental purpose of the privilege is to avoid 'subject[ing] those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt,' . . . [and (b) that] one can commit 'perjury' only with respect to an assertion." *Id.* (citation omitted). The dissent contends that the majority opinion errs in finding that Ranauro would "assert" consent by executing the form:

> [He] does not 'assert' consent (nor does he 'admit' consent or 'assure' consent); rather, he performs a verbal act: he *grants* consent.
>
> . . . This linguistic' point is important because a grant of consent is not the kind of thing that can be true or false. . . . [I]t is not a proper subject matter of a perjury proceeding.

Id. at 798. Judge Breyer is careful to note that he does "*not* mean to say the [f]ifth [a]mendment can apply only when indictable 'perjury' is at issue." *Id.* "Rather, I note simply that legal perjury and the fifth amendment have one thing in common: both deal with assertions—the kind of communication that could, in principle, be false." *Id.*

313 *Id.* at 794 (citing Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964)). The majority quotes a passage from *Murphy* in which the Supreme Court identifies six "fundamental values" which the privilege reflects *in addition* to the "cruel trilemma of self-accusation, perjury or contempt". *Id.* at 794 n.3 (quoting 378 U.S. at 55). The majority opinion also asserts that the validity of its position "is illustrated by perhaps the most blatant imaginable example of a fifth amendment violation, where a court orders a suspect to either swear to a prepared confession or suffer the penalties of contempt." *Id.* at 794.

314 *Id.* at 794.

> Since the content of a physical characteristic . . . pre-exists any court order, the only thing compelled by the government . . . is the *act of producing* the pre-existing physical characteristic in the form of a sample. Since the *creation* of the characteristic is not compelled, its content, even if testimonial and no matter how incriminating, falls outside the scope of the privilege. In contrast, in this case the government is compelling the *creation of the content*, not the production, of the evidence "I consent."

Id.

315 This reconciliation is possible with, however, certain exceptions. *See supra* pt. III(B).

316 425 U.S. 391 (1976).

317 103 U.S. 916 (1983).

part IV(B) articulates the analysis.

A. *A Proposition and an Observation*

1. *Fisher v. United States*

Part III(A) of this Article discussed the U.S. Supreme Court's opinion in *Fisher*; that discussion did not, however, consider a subordinate proposition which was enunciated as an aspect of the holding in that case. In other words the surrender of Fisher's documents did not constitute a testimonial assertion because "[t]he existence and location of the papers [was] a foregone conclusion," so that Fisher "add[ed] little or nothing to the sum total of the [G]overnment's information by conceding that he in fact ha[d] the papers."[318]

This proposition was appended to the Court's holding that "[t]he act of producing evidence in response to a subpoena . . . has communicative aspects of its own, wholly aside from the contents of the papers produced."[319] The "communicative aspects" of such an act lie in the possibility that "[c]ompliance . . . [will] tacitly concede[ ] the existence of the papers demanded . . . their possession or control by the taxpayer . . . . [and] the taxpayer's belief that the papers are those described in the subpoena."[320] Whether such a tacit concession actually exists "depend[s] on the facts and circumstances of particular cases or classes thereof."[321]

The Court applied this proposition in *Doe*:[322] Unlike Fisher, "John Doe" "did not concede . . . that the records listed in the subpoena actually existed or were in his possession."[323] Instead, he "argued that by producing the records he would tacitly admit their existence and his possession."[324] Doe also argued that

> if the Government obtained the documents from another source, it would have to authenticate them before they would be admissible at

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318 425 U.S. at 411 ("*Fisher*" is a collective reference to Solomon Fisher, Cyril D. Kasmir, and Jerry Candy, attorneys of the taxpayers whose cases were jointly decided by the *Fisher* opinion.). *See id.* at 393-96. *See supra* pt. III(A) (for a discussion of the facts at issue in *Fisher*).

319 *Fisher*, 425 U.S. at 410. *See also supra* pt. III(A).

320 *Fisher*, 425 U.S. at 410 (citing Curcio v. United States, 354 U.S. 118, 125 (1957)). *See also supra* pt. III(A).

321 *Fisher* 425 U.S. at 410 ("These questions . . . do not lend themselves to categorical answers.").

322 465 U.S. 605 (1984). *See supra* pt. III(A) (for a discussion of the holding in *Doe*).

323 *Doe*, 465 U.S. at 614 n.13. In *Fisher*, the taxpayers "stipulated . . . that the documents involved . . . exist[ed] and [were] those described in the subpoenas . . . ." *Fisher*, 425 U.S. at 430 n.9 (Brennan, J., concurring).

324 *Doe*, 465 U.S. at 614 n.13. Doe presented his arguments in a motion to quash which was filed with the District Court for the District Court of New Jersey; that court "found that the act of production would compel [Doe] to admit that the records exist, that they are in his possession, and that they are authentic.' " *Id.* at 608 (quoting *In re* Grand Jury Empanelled Mar. 19, 1980, 541 F. Supp. 1, 3 (1981)).

> trial. . . . By producing the documents, [he] would relieve the [g]overnment of the need for authentication.[325]

After holding that "[t]hese allegations were sufficient to establish a valid claim of the privilege against self-incrimination,"[326] the Court included the following qualification: "This is not to say that the [g]overnment was foreclosed from rebutting [Doe's] claim by producing evidence that possession, existence, and authentication were a 'foregone conclusion.' "[327]

The "foregone conclusion" test clearly cannot be used in determining whether a particular act is encompassed by the protections of the fifth amendment. Less clear is whether the test derives from the testimonial or incriminating aspects of the act of production. The majority opinion in *Fisher* is apparently predicated upon the testimonial significance of such an act, while Justice Brennan issued a concurring opinion which was predicated upon the incriminating potential of an act of production.[328] Although resolution of this issue is of particular significance to the "compelled consents" analysis, it is also a matter which is most appropriately addressed after the discussion of *South Dakota v. Neville*. The resolution of this issue, therefore, appears in part IV(B).

Aside from this uncertainty, the test is firmly grounded in traditional fifth amendment precepts: Professor Wigmore presents an exhaustive discussion of "the dozen policies which have been advanced" as justifying the privilege against self-incrimination which is embodied in

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325 *Doe*, 465 U.S. at 614 n.13. (citation omitted).

326 *Id.*

327 *Id.* (citing *Fisher*, 425 U.S. at 411).

328 I disagree . . . that implicit admission of the existence and possession or control of the papers . . . is not "testimonial" merely because the government could readily have otherwise proved existence and possession or control. . . . I know of no [f]ifth [a]mendment principle which makes the testimonial nature of evidence . . . turn on the strength of the Government's case. . . .

Fisher, 425 U.S. at 428-29 (Brennan, J., concurring).

> Justice Brennan concluded, however, that notwithstanding the testimonial significance of [the *Fisher*] taxpayers' production of their records, the implicit testimony they would furnish . . . would not tend to incriminate them because they had already stipulated that the records existed and that those records matched the descriptions contained in the subpoenas. . . .
>
> The difference between Justice Brennan's view and that of the majority seems largely semantic. *Whether the strength of the Government's evidence determines the protection to be accorded the act of producing . . . documents because it diminishes the act's testimonial value or because it lessens its self-incriminating character is of little moment, so long as the substantive threshold for protection remains the same.*

In re Sealed Case, 832 F.2d 1268, 1276 n.5 (D.C. Cir. 1987) (emphasis added and citation omitted) (noting that "[t]he substantive equivalence of the two views is further evidenced by the fact that Justice Brennan did not take issue with the majority's reiteration of *Fisher*'s 'foregone conclusion' test in *Texas Doe*.") (citing 465 U.S. at 614 n.3.).

that amendment.[329] After considering and rejecting nine such policies, Wigmore arrives at what he describes as a "concern . . . with the 'fishing expedition,' with what under Elizabeth and James amounted to the unlawful process of poking about in the speculation of finding something chargeable."[330]

Although he discusses this policy in a slightly different context,[331] Wigmore's observations are perfectly applicable to the (perhaps implicit) considerations which prompted the articulation of the "foregone conclusion" test. What he calls "[t]he 'pure poking about' fishing expedition" is one of the evils which that test is intended to eliminate. The goal is to ensure that the government not utilize the subpoena power to "poke about" in an individual's files in order to locate evidence the nature and existence of which was previously unknown to law enforcement officials.[332] As part IV(B) illustrates the result of such an enterprise is coerced self-incrimination in violation of the clear dictates of the fifth amendment.[333]

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329 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2251 at 297 (McNaughton ed. 1961) (footnote omitted).

330 *Id.* at 314. The condemnation of such expenditures is, of course, a traditional feature of fifth amendment analysis. *See, e.g.*, United States v. Fox, 721 F.2d 32, 38 (2d Cir. 1983), *quoted in Texas Doe*, 599 F. Supp. 746, 748 (S.D. Tex 1984) and United States v. Pedro, 662 F. Supp. 47, 49 (W.D. Ky. 1987). *See supra* pt. III(B)(2).

331 Wigmore suggests that the concern with discouraging "fishing expeditions" reflects a desire to "protect[ ] the individual from being prosecuted for crimes of insufficient notoriety or seriousness to be of a real concern to society." 8 J. WIGMORE, *supra* note 329, § 2251, at 314. Each of us, after all, is a criminal more or less. But as to most of our crimes we are, practically speaking, the indispensable threshold witnesses. It could go without saying that the law does not intend that all these crimes be prosecuted. *Id.* at 314-15 (footnote omitted).

332 A recent Eighth Circuit decision explicates this aspect of the *Fisher* holding:

> The *Fisher* Court . . . suggest[ed] that if the existence, possession, and authenticity of the documents are a "foregone conclusion" and the taxpayer "adds little or nothing to the sum total of the Government's information" by his act of producing the documents, the taxpayer's [f]ifth [a]mendment privilege is not violated "because nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege." . . . In such a case the tacit averments of the taxpayer in producing the documents would not rise to the level of testimony within the protection of the [f]ifth [a]mendment, since any information implicitly conceded in producing the documents is already within the Government's knowledge. "Under these circumstances by enforcement of the summons no constitutional rights are touched. The question is not of testimony but of surrender.' "

United States v. Rue, 819 F.2d 1488, 1492 (8th Cir. 1987) (citations omitted) (quoting *Fisher*, 425 U.S. at 411 (quoting *In re* Harris, 221 U.S. 274, 279 (1911))). *Rue* held that "the burdens of production and proof on the questions of the existence, possession, and authenticity of . . . summoned documents are on the Government, not the taxpayer." 819 F.2d at 1493 n.4 (citing *Doe*, 465 U.S. at 614 n.13).

333 For the proposition that the privilege only permits inquiries which *add to* the government's existing knowledge as to the commission of criminal acts, see United States v. Schlansky, 709 F.2d 1079, 1084 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984) ("[d]oes it confirm that which was

(2) *South Dakota v. Neville*

While it is clear that the privilege protects against "the cruel, [*literal*] expedient of compelling [incriminating testimony] from [the individual's] own mouth,"[334] the extent to which this protection extends to more esoteric forms of communication has been a matter of some debate. Wigmore contended that the privilege is "limited to words spoken by the subject."[335] Although the U.S. Supreme Court has rejected Wigmore's contention, it has also found that various non-verbal acts do not constitute "testimonial communications" within the compass of the privilege.[336]

It appears that the Court has at least implicitly adopted Wigmore's analysis of the testimonial possibilities of non-verbal physical acts.[337] Wigmore distinguished between physical acts as *communication* and as *real evidence*.[338]

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previously unknown to the government[?]"); United States v. Fox, 721 F.2d 32, 38 (2d Cir. 1983) (does it add to the "sum total of the Government's information . . . [?]").

> "[T]he constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens. To maintain a fair state-individual balance,' to require the government to shoulder the entire load' . . . our accusatory system of criminal justice demands that the government seeking to punish an individual *produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.*"

Schmerber v. California, 384 U.S. 757, 762 (1966)) (quoting Miranda v. Arizona, 384 U.S. 436 (1966)). The *Ranauro* court quoted this passage as supporting the proposition that

> [e]ven if the consent form . . . were not, by itself, to be considered direct testimony by Ranauro of his control over whatever bank accounts are produced as a result of his execution of the form, it so closely approximates such testimony that we believe its compelled creation and subsequently incriminating use would violate not only the values underlying the fifth amendment but also the essence of our accusatorial system of justice[.]

Ranauro, 814 F.2d at 794. *See also supra* pt. III(B)(2).

334 *Schmerber*, 384 U.S. at 762 (quoting Miranda v. Arizona, 384 U.S. 436 (1966)).

335 MCCORMICK ON EVIDENCE § 124, at 302 (3d ed. 1984) (citing 8 J. WIGMORE, *supra* note 329; § 2263 at 378-79). According to Wigmore, the privilege "was directed at the employment of legal process to *extract from the person's own lips* an admission of guilt which would thus take the place of other evidence. That is, it was intended to prevent the use of legal compulsion to extract from the person a sworn communication of his knowledge of facts which would incriminate him." 8 J. WIGMORE, *supra* note 329, § 2263, at 378-79.

336 Schmerber v. California, 384 U.S. 757, 763 n.7 (1966). For a discussion of the acts which have been held not to constitute such communications, see *id.* (blood tests); United States v. Wade, 388 U.S. 218, 221-23 (1967) (lineups); United States v. Dionisio, 410 U.S. 1, 5-7 (1973) (voice exemplar); Gilbert v. California, 388 U.S. 263, 266 (1967) (handwriting exemplar). *See also* Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect*, 43 SO. CAL. L. REV. 597 (1970).

337 Although the Court first applied this analysis in a case which antedated the appearance of Wigmore's treatise, subsequent decisions appear to have followed Wigmore's conceptualization of that analysis. *See* Holt v. United States, 218 U.S. 245 (1910); Schmerber v. California, 384 U.S. 757, 763-64 (1966). *See also Schmerber*, 384 U.S. at 774-75 (Black, J., dissenting).

338 If, for example, it is desired to ascertain whether the accused has lost his right hand

According to Wigmore, physical acts, statements or both do not constitute "testimonial evidence" whenever their evidentiary significance does not depend upon a process of inference, but is equivalent to that associated with any artifact which is introduced as a form of direct evidence.[339] The Court first applied this distinction in *Holt v. United States*:[340]

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and wears an iron hook in place of it, one source of belief on the subject would be the testimony of a witness who had seen the arm; in believing this testimonial evidence, there is an inference from the human assertion to the fact asserted. A second source of belief would be the mark left on some substance grasped or carried by the accused; in believing this circumstantial evidence, there is an inference from the circumstance to the thing producing it. A third source of belief remains, namely, the *inspection by the tribunal* of the accused's arm. This source differs from the other two in omitting any step of conscious inference or reasoning, and in proceeding by direct self-perception. . . .

4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1150 at 322 (McNaughton ed. 1961). Wigmore prefers the phrase "*autoptic proference*" to the term "real evidence" for the reason that the evidentiary significance of a particular artifact results from "the tribunal's self-perception, or autopsy, of the thing itself." *Id.*

Autoptic proference calls for no inference from the thing perceived to some other thing; and in this sense . . . autoptic proference is "not evidence," i.e., not evidence in so far as evidence implies a process of inference. . . . It is something more than and different from testimonial or circumstantial evidence, and it is to be included among the kinds of evidence in the broader sense of that term.

Id. at 324.

339 8 J. WIGMORE, *supra* note 329, § 2265 at 386 (citations omitted).

[A]n inspection of the bodily features by the tribunal . . . does not violate the privilege [against self-incrimination] because it does not call upon the accused as a witness—i.e., upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action—as when he is required to take off his shoes or roll up his sleeve—is immaterial, unless all bodily actions were synonymous with testimonial utterance. . . . What is obtained from the accused by such action is not testimony about his body, but his body itself. . . . Unless some attempt is made to secure a communication—written, oral or otherwise—upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one.

Id. at 386. "E.g. viewing, measuring, placing a hat on and even moving a limb of the relaxed body of the individual do not offend the policies of the privilege . . . and are not the sort of things which historically gave rise to the privilege . . . ." *Id.* at 378, § 2263 (references and footnote omitted).

[B]oth federal and state courts have usually held that [the privilege against self-incrimination] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction . . . *is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.*

Schmerber v. California, 384 U.S. 757, 764 (1966) (emphasis added and footnote omitted).

340 218 U.S. 245 (1910). The *Holt* decision, of course, antedates the issuance of the treatise in which Wigmore developed the above-noted distinction between physical acts and states as *communication* and as *real evidence*. *See, e.g.*, 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2265 (1st ed. 1905). Although *Holt* applies the distinction, the application is not accompanied by an articulated rationale but is, instead, justified on the following basis: "[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or

> There the question was whether evidence was admissible that the accused, prior to trial and over his protest, put on a blouse that fitted him. It was contended that compelling the accused to submit to the demand that he model the blouse violated the privilege. Mr. Justice Holmes, speaking for the Court, rejected the argument . . . : "[T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."[341]

The *Holt* analysis has been extended to encompass artifacts generated by physical acts, as well as the physical acts.[342]

This rationale has led the Court to conclude that, for example, handwriting exemplars do not constitute "testimonial communications" within the meaning of the privilege.[343] The essential distinction is between "artifact" and "communication." If the evidentiary importance of a particular physical act, or the product of a particular physical act, is as

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moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Holt*, 218 U.S. at 252-53. The only authority *Holt* cites as support for this proposition is *Adam v. New York* which held that the privilege against self-incrimination was not violated by the admission of the accused's "private papers" given that "[h]e did not take the witness stand in his own behalf" and "was not compelled to testify concerning the papers or make any admission about them." Adam v. New York, 192 U.S. 585, 597-98 (1904) (citing Boyd v. United States, 116 U.S. 616 (1886)). It appears, therefore, that *Holt* antedated Wigmore's development of his analysis as to why corporeal evidence does not constitute a testimonial communication which is encompassed by the privilege; it also appears that the Supreme Court subsequently adopted Wigmore's formulation of this issue as the rationale for decisions which followed this aspect of *Holt*. *See generally* Annotation, *Physical Examination or Exhibition of, or Tests Upon, Suspect or Accused, As Violating Rights Guaranteed By Federal Constitution—Federal Cases*, 16 L. Ed. 2d 1332 (*1967*); Annotation, *Physical Examination or Exhibition of, or Tests Upon, Suspect or Accused, As Violating Rights Guaranteed By Federal Constitution—Federal Cases*, 22 L. Ed. 2d 909 (*1970*); Annotation, *Requiring Submission to Physical Examination or Test As Violation of Constitutional Rights*, 25 A.L.R.2d 1407 (*1952*).

341 *Schmerber*, 384 U.S. at 763 (quoting Holt v. United States, 218 U.S. 245, 252-53 (1910) (footnote omitted). Although the omitted footnote contains the *Schmerber* Court's rejection of Wigmore's categorical limitation of the privilege to verbal communications, it appears that the Court followed Wigmore in holding that the privilege does not apply whenever physical acts or states are admissible as "real or physical evidence." *See Schmerber*, 384 U.S. at 763 n.7.

342 *See, e.g.*, 8 J. WIGMORE, *supra* note 329, § 2265 (fingerprints, photographs, voice exemplars, handwriting samples).

343 "A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside" the protection of the privilege. Gilbert v. California, 388 U.S. 263, 266-67 (1967) (citing United States v. Wade, 388 U.S. 218, 222-23 (1967) (voice exemplars)). *See also* 8 J. WIGMORE, *supra* note 329, § 2263 at 397; Hartzell v. United States, 72 F.2d 569, 585 (8th Cir. 1934) (accused's signature on bail bond used as sample of handwriting for comparison purposes did not constitute "testimony" within the compass of the privilege).

an artifact, a species of "real or physical evidence," then the privilege does not apply.

Recently, however, the Court has recognized that the distinction cannot always be applied categorically. The Court in *South Dakota v. Neville*[344] considered the testimonial significance of a driver's refusal to submit to a blood alcohol test.[345] A state statute provided that such a refusal was "admissible into evidence at a trial for driving under the influence of alcohol."[346] Neville was stopped by two police officers, who asked that he submit to such a test; Neville refused, announcing "I'm too drunk, I won't pass."[347]

Neville eventually sought to suppress the evidence of his refusal to take the test; the local court granted his motion, and the South Dakota Supreme Court affirmed, holding that the statute "violated the federal and state privilege against self-incrimination."[348] The South Dakota court concluded that "the refusal was a communicative act involving [Neville's] testimonial capacities and that the State compelled this communication by forcing [him] "to choose between submitting to a perhaps unpleasant examination and producing testimonial evidence against himself."[349]

On appeal the U.S. Supreme Court found "considerable force" in the argument that the refusal was not testimonial, but "similar to other circumstantial evidence of consciousness of guilt, such as escape from custody and suppression of evidence."[350] Still, it declined to hold that such a refusal can never constitute a testimonial communication within

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344 459 U.S. 553 (1983).

345 *Id.* at 554. "We now address a question left open in [footnote nine of *Schmerber*], and hold that the admission into evidence of a defendant's refusal to submit to such a test . . . does not offend the right against self-incrimination." *Id.*

346 *Id.* at 554 n.4 (quoting S.D. CODIFIED LAWS ANN. § 19-13-28.1 (Supp. 1982)). Under the statute, one could "not claim privilege against self-incrimination with regard to admission of refusal to submit to chemical analysis." *Id. See also* S.D. CODIFIED LAWS ANN. § 32-23-10.1 (Supp. 1982) ("refusal to submit to blood alcohol test may be admissible into evidence at the trial' ") (quoting *Neville*, 459 U.S. at 556).

347 *Neville*, 459 U.S. at 555. After he was taken to the police station, Neville "informed the officers that he had been drinking 'close to one case' by himself at home, and that his last drink was 'about ten minutes ago.' " *Id.* at 556 n.3.

348 *Id.* at 556 (citing State v. Neville, 312 N.W.2d 723 (S.D. 1981)).

349 *Id.* at 557-58 (quoting *Neville* 312 N.W.2d at 726 and State v. Andrews, 297 Minn. 260, 262, 212 N.W.2d 863, 864 (1973), *cert. denied*, 419 U.S. 881 (1974)).

350 *Id.* at 561. The state drew an analogy between refusing to take a blood test and acts such as flight and the suppression of evidence. *See id.* at 561. The Court's position on this issue is consistent with that which appears in the plurality opinion in *California v. Byers*. The opinion upheld the constitutionality of a statute which required that motor vehicle operators who were involved in accidents stop and furnish their name and address to the other individuals who were involved. Although Chief Justice Burger contended that the act of stopping was "no more testimonial" than the acts of appearing in a line-up or of giving a handwriting exemplar, the majority disagreed, holding that the act was, indeed, "testimonial" within the meaning of the fifth amendment. *Id.* at 431.

the compass of the privilege.[351] Because it declined to hold that such a refusal can never constitute a testimonial communication,[352] the Court predicated its holding upon an alternative theory: there was no infringement of the privilege because Neville was not subjected to "impermissible compulsion."[353]

The significance of *Neville* lay in its explicit recognition of the communicative ambiguity which is associated with certain categories of physical acts. Although the recognition of this circumstance was implicit in some of the Court's earlier decisions, *Neville* was the first to predicate its holding upon the testimonial ambiguities inherent in a given act.[354]

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351 *Neville*, 459 U.S. at 561-62 (citing *Schmerber*, 384 U.S. at 764).

> [T]he distinction between real or physical evidence, on the one hand, and communications or testimony, on the other, is not readily drawn in many cases. . . . The situations arising from a refusal present a difficult gradation from a person who indicates refusal by complete inaction, to one who nods his head negatively, to one who states "I refuse to take the test," to the respondent here, who stated, "I'm too drunk, I won't pass the test."

Id. The citation to *Schmerber* is a reference to the holding that "the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Schmerber*, 384 U.S. at 764.

352 *Neville*, of course, differs from the facts which were at issue in *Schmerber* where the Supreme Court held that the results of a blood test do not constitute testimonial communication within the meaning of the fifth amendment. The *Schmerber* holding was based upon the distinction presented above, i.e., that the results of the test constituted an artifact, a species of "real or physical evidence." *Schmerber*, 384 U.S. at 764. The Court found that Schmerber's "testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone." *Id.* at 765 (footnote omitted). Schmerber also argued that the state violated his fifth amendment privilege by introducing evidence that he refused to submit to a "breathalyzer" test; the court held, however, that the argument was "foreclosed by [Schmerber's] failure to object on this ground" at trial. *Id.* at 765-66 n.9.

353 *See Neville*, 459 U.S. at 562. "Since no impermissible coercion is involved when the suspect refuses to submit to take the test, regardless of the form of refusal, we prefer to rest our decision on this ground. . . ." *Id.*

354 One area in which this issue had arisen, prior to *Neville*, was the use of polygraphs, or "lie detectors." After discussing this distinction between physical acts as "tesimony" and as "real or physical evidence", the *Schmerber* Court offered the following observations on this issue:

> Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the [f]ifth [a]mendment.

Schmerber, 384 U.S. at 764. The Court also found, however, that "no such problem of application [was] presented" on the facts before it because "[n]ot even a shadow of testimonial compulsion upon or enforced communication by the accused was involved . . . in the extraction" of blood. *See id.* at 765. *See also* 8 J. WIGMORE, *supra* note 329, § 2265. *See generally* Estelle v. Smith, 451 U.S. 454 (1981) (statements to psychiatrist during court-ordered examination encompassed by the privilege).

B. *"Foregone Conclusions" and "Fishing Expeditions": An Analysis of the Fifth Amendment Consequences of "Compelled Consents"*

Neville recognized that particular physical acts can constitute *either* "testimony" within the compass of the fifth amendment privilege against self-incrimination *or* "real or physical evidence" to which the privilege does not apply. Implicit in this recognition was the rejection of a proposition which appears to animate certain of the Court's decisions and which Wigmore explicitly adopts: the protections of the fifth amendment apply only to oral communications.[355]

Although it is questionable whether the Court ever adopted this proposition,[356] many of its decisions appear to rely upon a categorical distinction between "testimony" and physical states or conduct.[357] *Neville*, however, definitely established that the testimonial significance of particular, non-verbal conduct is not a matter which can be determined categorically. Instead, the testimonial significance of such conduct can be determined only by considering the "facts and circumstances of particular cases."[358]

It is this principle that provides the key to understanding the cases which were discussed in part III(B). Although they do not explicitly address this issue, case holdings result from either (a) the implicit application of this principle,[359] or (b) the implicit rejection of this principle in favor of the principle which was explicitly rejected in *Neville*, i.e., that physical conduct can never constitute "testimonial communication" within the meaning of the fifth amendment.[360]

The cases which implicitly rejected the principle held that the execution of a "compelled consent" is not an act which is encompassed by the privilege against self-incrimination.[361] These holdings err because (a) they ignore the *Neville* principle, and (b) they ignore the observation

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355 Wigmore apparently derives his position on this issue from the proposition that the privilege was articulated in order to "prevent[ ] torture and other inhumane treatment of a human being." 8 J. WIGMORE, *supra* note 329, § 2251 at 315. *See id.* § 2251 at 315-16.

356 *See supra* pt. IV(A).

357 *See, e.g.*, Holt v. United States, 218 U.S. 245 (1910).

358 Fisher v. United States, 425 U.S. 391, 410 (1976) (describing the inquiry which must be conducted in order to determine whether a particular act of production is "testimonial' and incriminating' for purposes of . . . the [f]ifth [a]mendment"). *Id.* Interestingly enough, *Fisher* cites no authority as support for this proposition. *See id.*

Although the *Fisher* Court was speaking only of the testimonial implications of the act of producing documents, this observation is perfectly consistent with *Neville*'s holding that "the distinction between real or physical evidence . . . and communications or testimony" can be a function of the peculiar circumstances which are involved in a particular instance. *See, e.g., Neville*, 459 U.S. at 561.

359 *See supra* pt. III(B)(2).

360 *See supra* pt. III(B)(1).

361 *Id.*

in *Fisher* that whether "[t]he act of producing evidence in response to a subpoena" has "testimonial" and "incriminating" aspects depends upon the "facts and circumstances of particular cases."[362]

The cases which held that the execution of a "compelled consent" is an act which is encompassed by the fifth amendment applied an essentially unarticulated version of the analysis which must be utilized in this context. The analysis is derived from three propositions: (1) the *Neville* proposition that the communicative aspects of physical conduct are a function of the particular conduct which is at issue and of the context in which it occurs; (2) the *Fisher* proposition that the "testimonial" and "incriminating" nature of production must be determined from the "facts and circumstances of [a] particular" case; and (3) the subordinate *Fisher* proposition that an act of production cannot be "testimonial" within the meaning of the fifth amendment if it "adds little or nothing to the sum total of the Government's information."[363]

The application of this analysis results in the following calculus. The execution of a "compelled consent" may be a "testimonial" act; whether the execution of a *particular* "compelled consent" is a "testimonial" act within the meaning of the fifth amendment depends, initially, upon whether the "existence and location" of the documents for which production is sought is "a foregone conclusion."

If the existence and location of the documents *is* a "foregone conclusion," then the execution of the consent *cannot be* a "testimonial communication," because it adds "little or nothing to the sum total of the Government's information."[364] The consent does not constitute "testimony" because the government learns nothing from the physical act of executing the document; instead, the execution of the document is a physical act which "merely . . . 'remove[s] an obstacle' to the production of foreign bank records."[365]

In this instance, the physical act of signing the form is analytically indistinguishable from the physical act of providing a handwriting exemplar. The government "discovers" nothing from the act. Unlike the physical act which was at issue in *Neville*, the execution of the exemplar cannot be used as the basis for an inference which supports a finding of guilt.[366] Perhaps the better analogy is to the act of supplying blood for a

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362 *Fisher*, 425 U.S. at 410.

363 *Id.* at 411. If, in other words, "[t]he existence and location of the papers are a foregone conclusion." *Id.* at 411. *See supra* pt. IV(A).

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

365 United States v. Browne, 624 F. Supp. 245, 249 (N.D.N.Y. 1985) (quoting United States v. Quigg, Crim. No. 80-41-1, slip op. at 5, (D. Vt. Jan. 5, 1981)).

366 This is true, of course, so long as the consent, or a court order attendant upon the execution of the consent, provides that it cannot be used as an admission. *See, e.g.*, United States v. Grand Jury Witness, 811 F.2d 114, 117 (2d Cir. 1987). *See also supra* pt. III(B)(1).

blood alcohol test. In both instances, the accused is compelled to perform a physical act which has no intrinsic testimonial significance but which results in the production of physical evidence that can be used against him.

With respect to the act of supplying blood, the government "discovers" no new information from the act. Rather, it obtains a physical artifact which may provide "real or physical evidence" to support a finding of guilt.[367] With respect to the execution of a consent directive, as long as the "existence and location" of the documents is a "foregone conclusion," the same result ensues. That is, if the government is aware of the "existence and location" of the documents, then the physical act of executing such a directive communicates no new information but simply yields a physical artifact which may provide "real or physical evidence" to support a finding of guilt.

If, however, the government is not aware of the "existence and location" of the documents, then the physical act of executing such a form *does* communicate new information. The "testimonial communication" is hence encompassed by the privilege.[368] The execution of the consent permits the government to "discover" evidence of which it was ignorant, thereby permitting "precisely [the] sort of fishing expedition that the fifth amendment was designed to prevent."[369]

The implicit recognition of this principle animates the holdings in the decisions considered in part II(B)(2). Those decisions held that the

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367 Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction [of blood] or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone.

Schmerber, 384 U.S. at 765 (footnote omitted).

368 The [Senate] Committee is asking the Court to order Secord to place his signature at the bottom of a prepared consent directive. By characterizing the directive as a tool to obtain unprotected bank records, the Committee likens the signing of it to the preparation of a handwriting exemplar, which is clearly non-testimonial. The difference, however, is that the directive's *content* is what the Committee needs, not a sample of Secord's handwriting.

Senate Select Comm. v. Secord, 664 F. Supp. 562, 565 (D.D.C. 1987) (emphasis in original and citation omitted). *See also* United States v. Pedro, 662 F. Supp. 47, 49 (W.D. Ky. 1987) ("The government needs Respondent's signature for what it could disclose and Respondent would, thus, be testifying within the meaning of the fifth amendment.").

369 United States v. Fox, 721 F.2d 32, 38 (2d Cir. 1983). *Fox* provides the perfect illustration of this proposition, although in a slightly different context. After the Internal Revenue Service ("IRS") issued an administrative summons requiring that he "appear, testify and produce . . . documents," Dr. Martin Fox refused to comply, "invoking his [f]ifth [a]mendment privilege against self-incrimination." *Id.* at 34. The IRS petitioned for enforcement of the summons, and the district court granted that petition. *Id.* at 34-35.

Fox appealed to the Second Circuit, arguing that "enforcement . . . would require him to perform . . . incriminating testimonial acts . . . [in that] he would be forced (1) *to acknowledge the*

execution of a consent directive is a "testimonial communication" which is encompassed by the protections of the fifth amendment privilege against self-incrimination. The implicit recognition and application of this principle is evident both from these holdings and the factors upon which these courts relied in arriving at their holdings. Several of these decisions found it significant, for example, that the individual who was refusing to execute such a consent had not been indicted.[370]

Why is the lack of an indictment significant for purposes of a fifth amendment analysis of the "testimonial" consequences of a particular act? In Justice Brennan's concurring opinion in *Fisher*, he observed that the testimonial significance of a particular act should not "turn on the strength of the [g]overnment's case" against an individual.[371]

These decisions apparently used the lack of an indictment as an implicit indicator of the "strength of the Government's case," from which one can infer that these courts were applying the following analysis to determine whether the execution of a consent directive was "testimonial" within the compass of the fifth amendment. If an indictment had been returned, then this indicated that the government was aware of the "existence and location" of the accounts which were at issue in the consent directive; if the government did possess such information, then the execution of the directive was permissible under the "foregone conclusion" standard in *Fisher*.

If, however, an indictment had not been returned, then this meant that the government was not aware of the "existence and location" of the accounts which were at issue in the consent directive; if the government was not already aware of this information, then the execution of the directive would provide the government with new information and would, therefore, constitute a "testimonial communication" within the meaning

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existence of records of which the government was unaware, and (2) to implicitly authenticate the records of his own." *Id.* at 37 (emphasis added). The Second Circuit agreed. *Id.*

With respect to the first proposition, the court found that the acknowledgment derived from the non-specific language used in the summons:

> [T]he IRS summons for *all* books and records . . . and *all* bank and brokerage records of a taxpayer may compel the taxpayer to add to the "sum total of the Government's information." The inference we draw from this broad-sweeping summons is that the government is attempting to compensate for its lack of knowledge by requiring Dr. Fox to become the primary informant against himself. It is precisely this sort of fishing expedition that the [f]ifth [a]mendment was designed to prevent. Accordingly, we hold that the enforcement of this summons would result in compelled testimonial communication.

Id. at 38 (emphasis in original and citations omitted.).

370 *See, e.g., Pedro*, 662 F. Supp at 49; *Texas Doe*, 599 F. Supp. 746, 748 (S.D. Tex. 1984). Although the court did not emphasize this factor, the *Ranauro* decision also involved an individual who had not yet become the subject of an indictment. *See Ranauro*, 814 F.2d 791 (1st Cir. 1987). *Accord*, Senate Select Comm. v. Secord, 664 F. Supp 562 (D.D.C. 1987).

371 *Fisher*, 425 U.S. at 429 (Brennan, J., concurring). *See supra* pt. IV(A)(1).

of the fifth amendment.[372] It seems that the decisions which were considered in part III(B)(2), utilized the existence or non-existence of an indictment as a *prima facie* indicator for the application of the "foregone conclusion" standard.[373] Under this admittedly unexplicated calculus,[374] the inquiry utilizes the returning of an indictment as the "benchmark" for determining whether the government is endeavoring to embark upon a "fishing expedition" in violation of the fifth amendment protections.[375]

While this approach may possess a certain intuitive appeal, it is not consistent with the *Fisher* requirement that the "facts and circumstances" of a particular case must be considered in determining whether or not a given act constitutes a "testimonial communication" within the meaning of that amendment. Although no constitutional violation is likely to ensue from the application of this approach where no indictment has been returned, the converse is not true—that is, while it is almost certain that no constitutional error will result from a *refusal* to require

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372 In the present case, the consent directives are not limited to named banks and the government has effectively admitted that it does not know whether respondent, in fact, had a foreign bank account.... Thus,... compulsion of the proposed consent directives would supply a necessary link in the evidentiary chain by *confirming the existence or location of materials previously unknown to the government.*

Pedro, 662 F. Supp. at 49 (emphasis added). This passage illustrates that the *Pedro* court, for one, *was* applying the *Fisher* "foregone conclusion" standard, although without identifying it as such. *See id.* at 48-49. This opinion also includes an observation which supports the inference that the lack of an indictment has been used as an indicator of "the strength of the Government's case" for purposes of the application of the "foregone conclusion" standard. *"[T]he Respondent has not been indicted as the government apparently does not have enough evidence to obtain an indictment* and compelling Respondent to execute the proposed consent forms could provide the government with the incriminating link necessary to obtain an indictment." *Id.* at 49 (emphasis added).

373 *See Pedro*, 662 F. Supp. at 49. *See also Texas Doe*, 599 F. Supp. at 748 ("[w]hile the government appears to have some evidence which has been tendered for this Court's review, the government . . . does not have enough evidence to obtain an indictment").

374 Curiously, none of the decisions which were considered in *supra* pt. III(B)(2) explicitly predicated their holdings upon the *Fisher* "foregone conclusion" standard despite the fact that this analysis implicitly animates each decision. *See, e.g., Secord*, 664 F. Supp. at 564-65; *Texas Doe*, 599 F. Supp at 747-48; *Pedro*, 662 F. Supp. at 48-49; *Ranauro*, 814 F.2d 791, 792-93 (1st Cir. 1987).

375 Although not expressed in these terms, it may very well be that the cases which were considered *supra* pt. III(B)(1) applied the converse analysis, i.e., that the presence of an indictment is *prima facie* evidence that the "foregone conlusion" standard has been satisfied, so that the execution of a consent directive does not constitute a testimonial communication. *See, e.g.*, United States v. Ghidoni, 732 F.2d 814, 816 (11th Cir. 1984) (indictment returned); *Cid* 767 F.2d 1131, 1133 (5th Cir. 1985) ("existence of two prior indictments, one in the same district . . . and the other in the Southern District of Florida"); United States v. Thier, 767 F.2d 1133, 1134 (5th Cir. 1985) (records had already been produced after Louisiana and Florida state courts, and the Eleventh Circuit rejected Thier's arguments as to illegal electronic surveillance); United States v. Browne, 624 F. Supp. 245, 247 (N.D.N.Y. 1985) (indictment returned); United States v. Davis, 767 F.2d 1025, 1032-33 (2d Cir. 1985) (indictment returned; consent executed "weeks prior to trial" which resulted in conviction). *Cf. Contemnors*, 826 F.2d 1166, 1167 (2d Cir. 1987) (indictment affirmed); *Alexander*, 811 F.2d 114, 115 (2d Cir. 1987) (no indictment).

the execution of a consent, such error may result if the only requirement for execution is the returning of an indictment.

If the only requirement for execution is an indictment, then this invites the government to secure a *de minimis* indictment which can be used to obtain the execution of a consent directive; this consent directive, in turn, can be used to ascertain whether any additional evidence exists about which the government is ignorant but which can provide the basis for additional charges.[376] Once such a directive has been executed, the government can then use it to obtain the evidence in question; the evidence can provide the basis for the return of, and a conviction on, a superseding indictment which contains these additional charges.

This scenario illustrates the "testimonial" consequences of a directive which is executed whenever the "existence and location" of particular documents is not a "foregone conclusion." The execution of such a directive is a testimonial act insofar as it permits the government to "discover" additional evidence as to the existence of which it was ignorant; the execution of such a directive is, therefore, an act which is in direct contravention of the principle that the government is required to obtain evidence against individuals "through its own efforts" rather than through their compelled disclosures.[377]

To understand the inevitable validity of this conclusion, it is necessary to only apply a "but for" standard to this process: "but for" the execution of a consent directive in the last scenario described above, the government may never have discovered the "existence and location" of the documentary evidence at issue.[378]

The "but for" standard is, of course, not implicated in the first scenario described above. Because the "existence and location" of the documents is a "foregone conclusion" in this scenario, the execution of the consent has no "but for" consequences; because the execution of the consent has no "but for" consequences for the government's discovery of incriminating information, it does not constitute a testimonial act; because the government has already discovered the "existence and location" of the documents, the execution of the directive merely removes an obstacle to their physical production.

In this context, the execution of the consent is functionally indistinguishable from the physical act of allowing blood to be drawn for a blood alcohol test: "Under these circumstances . . . 'no constitutional rights are

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376 This, of course, is "precisely [the] sort of fishing expedition that the [f]ifth [a]mendment was designed to prevent." *Fox*, 721 F.2d at 38.

377 *See supra* pt. IV(A)(1).

378 The statement above is phrased in terms of the fact that the government "may" not have discovered the evidence both to encompass factual idiosyncrasies and in recognition of the individual peculiarities of the foreign banking laws which were described *supra* pt. I.

touched. The question is not of testimony but of surrender.' "[379]

It is now possible to resolve an issue which was apparently generated by Justice Brennan's concurring opinion in *Fisher*.[380] That concurrence asked whether, under the *Fisher* "foregone conclusion" standard, "the strength of the [g]overnment's evidence" is significant "because it diminishes the [act of production's] testimonial value or because it lessens its self-incriminating character."[381]

The resolution of this issue must, by now, be apparent:[382] The strength of the government's evidence is significant because, under the "foregone conclusion" standard, it determines whether any act of production, including the execution of a consent directive, has testimonial significance.

To understand why this resolution is correct, one has only to consider the following alternatives. If an individual is required to execute a consent directive authorizing the production of documents, and the "existence and location" of those documents *is* a "foregone conclusion," then the execution of that directive does not add "to the sum total of the Government's information." Therefore, there is no testimonial communication within the meaning of the fifth amendment.[383]

This does not, however, alter the fact that the documents for which production has been secured may be incriminating. In this instance, the individual has been compelled to perform a non-testimonial act with incriminating potential. Such an act is functionally indistinguishable from the act of providing a handwriting exemplar or appearing in a line-up; although either enterprise may very well be attended with incriminating consequences, the fact that these respective acts are not testimonial in nature removes them from the protections of the privilege.[384]

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[379] *Fisher*, 425 U.S. at 411 (quoting *In re* Harris, 211 U.S. 274, 279 (1911)).

This analysis illustrates the *indefensibility* of the position taken in *United States v. Browne*. *See supra* notes 198-217 and accompanying text. The *Browne* court, of course, found that production was not defeated by the fact that foreign bank secrecy laws arguably create a privacy interest in deposits residing in accounts located in those jurisdictions. The court decided that this interest must yield to those of the United States in law enforcement. *See supra* note 216 and accompanying text. The error of this approach, which rejected an aspect of the "but for" standard, is that it predicated the "but for" analysis upon the existence of foreign secrecy laws rather than upon the extent to which the "existence and location" of the documents is a "foregone conclusion." The latter predicate is, of course, appropriate under *Fisher*. The *Browne* court appears to have believed that "incrimination" was somehow dependent upon, or associated with, an enforceable privacy interest under U.S. law, rather than being a function of the extent to which production will add to the "sum total" of the government's knowledge. For this reason, therefore, the *Browne* opinion errs with regard to its analysis of the "but for" consequences of a particular production.

[380] *See supra* pt. IV(A)(1).

[381] *In re* Sealed Case, 832 F.2d 1268, 1276 n.5 (D.C. Cir. 1987). *See supra* pt. IV(A)(1).

[382] *In re* Sealed Case, 832 F.2d at 1276 n.5.

[383] *Texas Doe*, 599 F. Supp. at 748.

[384] *See supra* pt. IV(A).

If, however, an individual is required to execute a consent directive authorizing the production of documents and the "existence and location" of those documents is *not* a "foregone conclusion," then the execution of that directive does add "to the sum total of the Government's information" and is, therefore, a testimonial communication within the meaning of the fifth amendment. In this context, the individual is being compelled to perform a testimonial act that may be incriminating.[385] The *Fisher* approach must be taken in determining whether the execution of a particular "compelled consent" is a testimonial act within the compass of the fifth amendment; whether the "existence and location" of the documents for which production is sought a "foregone conclusion"? In resolving this inquiry, "the burdens of production and proof on the questions of the existence, possession, and authenticity of the summoned documents are on the Government."[386] This means that the government will be required to come forth with evidence establishing that it has, "produce[d] . . . evidence . . . by its own independent labors."[387] The court should require execution of the consent only if the government is able to establish that the "existence and location" of the documents for which production is sought is a "foregone conclusion" within the meaning of *Fisher*. To do otherwise is to sanction government "fishing expedi-

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385 The resolution which is presented above is derived, at least in part, from a simple parsing of the variables which are involved in a fifth amendment privilege against self-incrimination calculus. The privilege applies whenever three variables are present, i.e., a compelled testimonial communication with incriminating consequences. These variables then give rise to the eight logical possibilities:

(1) A compelled testimonial communication with incriminating consequences, such as the execution of a consent directive whenever the "existence and location" of the documents sought therein is *not* a "foregone conclusion"; the privilege applies.

(2) A compelled non-testimonial act with incriminating consequences, such as the execution of a consent directive whenever the "existence and location" of the documents sought therein *is* a "foregone conclusion"; the privilege does not apply.

(3) A compelled non-testimonial act without incriminating consequences; the privilege does not apply.

(4) A compelled testimonial communication without incriminating consequences; the privilege does not apply.

(5) A non-compelled testimonial communication with incriminating consequences; the privilege does not apply, for reasons which appear in the *Neville* opinions.

(6) A non-compelled non-testimonial communication with incriminating consequences; the privilege does not apply.

(7) A non-compelled testimonial communication without incriminating consequences; the privilege does not apply.

(8) A non-compelled non-testimonial communication with incriminating consequences; the privilege does not apply.

386 United States v. Rue, 819 F.2d 1488, 1493 n.4 (8th Cir. 1987) (enunciating the standard which is to be used in determining whether the fifth amendment prohibits the enforcement of an IRS Summons). *See supra* pt. IV(A)(1).

387 *Schmerber*, 384 U.S. at 762 (quoting Miranda v. Arizona, 384 U.S. 436 (1966)).

tions" which directly contravene the letter and spirit of the privilege which is embodied in the fifth amendment.

V. CONCLUSION

This Article has proposed an analysis of the extent to which the execution of consent directives, or "compelled consents" is an act which is encompassed by the protections of the fifth amendment privilege against self-incrimination. Part I described the factual context from which this issue has arisen, while part II considered select issues in the law of extra-territorial discovery in criminal proceedings. Part III examined the decisional law with respect to the use of such consents, while part IV proposed an analysis for determining when their execution is, indeed, encompassed by the protections of the fifth amendment.†

† This article was completed prior to the Supreme Court's decision in Doe v. United States, 108 S. Ct. 2341 (1988). The *Doe* opinion is discussed in the Paget-Brown article *supra*, at notes 100-13. — Ed.