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Abolition of Fifth Amendment Protection for the frontmatter of Preexisting Documents: United States v. Doe

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NOTES

ABOLITION OF FIFTH AMENDMENT PROTECTION FOR THE CONTENTS OF PREEXISTING DOCUMENTS: *UNITED STATES V. DOE*

IN the fall of 1980 a federal grand jury in Hudson County, New Jersey, began an investigation into corruption in the awarding of county and municipal contracts. A portion of the investigation centered on several companies that did business with various entities of the local government. Mr. Milton Reid (hereinafter referred to as "Mr. Doe")[1] allegedly operated all these companies as sole proprietorships. In November and December of 1980 the grand jury served five subpoenas duces tecum on Mr. Doe, ordering him to appear before the grand jury and produce certain business records. The subpoenas were broad, and the types of business records sought included such things as accounting ledgers and journals, copies of bills and invoices, bank statements and cancelled checks, names and home addresses of employees, phone company statements, and safe deposit box records. In response, Mr. Doe filed a motion in federal district court to quash the subpoenas. The district court for the District of New Jersey granted the motion to quash except with respect to those documents and records required by law to be kept or disclosed to a public agency, such as tax returns and W-2 statements.[2] The court reasoned that a sole proprietor may take advantage of the fifth amendment protection against self-incrimination[3] and that, in this case, the act of producing the docu-

1. The district court's report referred to him as Mr. Reid. *In re* Grand Jury Empanelled March 19, 1980, 541 F. Supp. 1 (D.N.J. 1981). He subsequently requested anonymity. *In re* Grand Jury Empanelled March 19, 1980, 680 F.2d 327, 328 n.1 (3d Cir. 1982).

2. *In re* Grand Jury Empanelled March 19, 1980, 541 F. Supp. 1, 3 (D.N.J. 1981). The Supreme Court first established the "required records doctrine" in Shapiro v. United States, 335 U.S. 1, 33 (1948). There the Court held that the fifth amendment does not protect records that are required to be kept by law and that serve a valid administrative purpose. *Id.* Later cases have clarified and limited the doctrine so that it now applies only to records required by statutes that are not aimed at select groups inherently suspect of criminal activity. *See* Marchetti v. United States, 390 U.S. 39, 57 (1968); *In re* Grand Jury Proceedings, 601 F.2d 162, 168 (5th Cir. 1979). *See generally* C. WHITEBREAD, CRIMINAL PROCEDURE § 14.05, at 265-71 (1980) (discussion of the statutory compulsion of records and cases that seek to reconcile the fifth amendment privilege with the legislature's legitimate goal of enacting regulatory legislation).

3. *In re* Grand Jury Empanelled March 19, 1980, 541 F. Supp. 1, 2 (D.N.J. 1981). Other business entities, such as corporations, unincorporated associations, and partnerships, cannot protect their records by invoking the fifth amendment privilege. *Id.*

ments had communicative aspects warranting that protection.[4] The Third Circuit Court of Appeals affirmed the district court's decision[5] and discussed at length the application of fifth amendment protection to the contents of documents.[6] The United States Supreme Court granted certiorari. *Held, affirmed in part, reversed in part, and remanded:* The fifth amendment right against self-incrimination does not protect the business records of a sole proprietorship, but it may protect the act of producing such records, and the production can be compelled only with a formal grant of statutory use immunity. *United States v. Doe*, 104 S. Ct. 1237, 79 L. Ed. 2d 552 (1984).

I. FIFTH AMENDMENT PROTECTION OF INCRIMINATING DOCUMENTS

Constitutional protection against self-incrimination derives from the fifth amendment, which states: "[N]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[7] This protection began in England in the 12th century with the struggle against the ecclesiastical courts' inquisitorial procedures,[8] which were designed to compel the subjects of an investigation to confess their own guilt.[9] The privilege against self-incrimination, as well as the history of the struggle to achieve the privilege, came to the United States as part of its common law heritage and was incorporated into the Constitution in the Bill of Rights.[10]

In interpreting the right against self-incrimination the Supreme Court has held that the fifth amendment must be construed broadly in favor of the right it was intended to protect.[11] Consequently, a witness may claim fifth amendment protection against a threat of incrimination whenever his reply might provide any link in the evidentiary chain necessary to convict him.[12] Use of the fifth amendment has not been limited to criminal trials, but has been extended to any governmental proceeding in which a person's

4. *Id.* at 3.
5. *In re* Grand Jury Empanelled March 19, 1980, 680 F.2d 327, 328 (3d Cir. 1982).
6. *Id.* at 331-34.
7. U.S. CONST. amend. V.
8. Michigan v. Tucker, 417 U.S. 433, 440 (1974).
9. *Id.* Typically, although the accused was not informed of the case against him, he was required to swear to give true answers and was then interrogated for the purpose of extracting a confession. The sworn statement to tell the truth became known as the oath *ex officio* because the judge was able to demand it by virtue of his office. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 46-47 (1968). The English people bitterly resisted this oath and the inquisition and occasional torture that accompanied it, and the ecclesiastical courts finally abolished the oath *ex officio* in 1641. *Id.* at 281-82. The right against self-incrimination evolved slowly in the common law courts until it became firmly embedded in the English judicial system. *Id.* at 331-32.
10. The right against self-incrimination is almost uniformly referred to as a "privilege." This title is, however, a misnomer. Although protection from compelled self-incriminating testimony originated in England as a common law privilege, it was made a constitutional right in this country as part of the fifth amendment, which was ratified in 1791. *Id.* at vii.
11. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892). In *Counselman* the Court stated: "The privilege . . . is as broad as the mischief against which it seeks to guard." *Id.*
12. Hoffman v. United States, 341 U.S. 479, 486 (1951). The Court in *Hoffman* declared that before a fifth amendment claim is disallowed it should be absolutely clear that the testimony could not possibly tend to incriminate. *Id.* at 488.

answers might incriminate him in future criminal proceedings.[13] The fifth amendment privilege has been declared a personal one, available only to natural persons.[14] The protection of the privilege does not extend to organizations that have established identities independent of their individual members or to representatives of such organizations acting in an official capacity.[15] Furthermore, the amendment does not protect voluntary admissions, no matter how incriminating; some form of compulsion is required in order to trigger the right to assert the fifth amendment.[16] The last requisite element of a valid claim of the privilege is some form of testimony inherent in the evidence compelled.[17] The element of compulsion and the requirement that the evidence sought be testimonial in nature have led to considerable litigation and debate over what is and is not protected by the fifth amendment.[18]

One of the earliest and most cited cases interpreting what constitutes compelled testimony protected by the fifth amendment is *Boyd v. United States*.[19] In that case Boyd was served with a subpoena duces tecum demanding the production of an invoice that the authorities thought would help prove that Boyd had failed to pay the duty on a shipment of imported

13. *See, e.g.*, Lefkowitz v. Turley, 414 U.S. 70, 77-78 (1973) (fifth amendment protects grand jury witnesses from compelled self-incrimination); Miranda v. Arizona, 384 U.S. 436, 458 (1966) (fifth amendment protects any accused subjected to custodial interrogation by law enforcement officials); Watkins v. United States, 354 U.S. 178, 188 (1957) (fifth amendment protects witnesses in congressional investigations).

14. United States v. White, 322 U.S. 694, 698 (1944).

15. *Id.* at 701; *see also* Bellis v. United States, 417 U.S. 85, 94-96 (1974) (fifth amendment does not apply to business partnerships); Rogers v. United States, 340 U.S. 367, 371-72 (1951) (fifth amendment does not apply to associations); Wilson v. United States, 221 U.S. 361, 382 (1911) (fifth amendment does not apply to corporations).

16. United States v. Washington, 431 U.S. 181, 187 (1977).

17. Schmerber v. California, 384 U.S. 757, 761 (1966). The Court in *Schmerber* said: "We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Id.*; *see also* United States v. Wade, 388 U.S. 218, 222 (1967) (participation in lineup not testimonial); Gilbert v. California, 388 U.S. 263, 266-67 (1967) (handwriting sample not testimonial).

18. *E.g.*, Garner v. United States, 424 U.S. 648, 665 (1976) (disclosures on tax returns not compelled if fifth amendment right not asserted on the returns); United States v. Dionsio, 410 U.S. 1, 7 (1973) (voice exemplar not testimonial in nature so subpoena of it for identification purposes not unconstitutional); Couch v. United States, 409 U.S. 322, 329 (1973) (evidence not protected by fifth amendment if compulsion not directed at person against whom evidence will be used).

See generally C. WHITEBREAD, *supra* note 2, §§ 14.05-.06, at 264-80 (discussing in depth the compulsion and testimonial evidence requirements). The requirements that the evidence sought be testimonial in nature and compelled by the state are particularly difficult to apply to cases in which the privilege is asserted to protect the contents of documents. Documents generally are compiled before their production as evidence is sought to be compelled, and information revealed by documents is less clearly testimony than are words spoken by a witness. Consequently, some commentators view the decisions that protect compelled disclosure of the contents of documents as being largely policy-based rather than having a basis in a literal interpretation of the fifth amendment. *See* McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 IND. L.J. 55, 59 & n.22 (1977-1978); Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 384-85 (1977).

19. 116 U.S. 616 (1886).

glass. The Court held that the fourth amendment's prohibition against unreasonable searches and seizures and the fifth amendment's self-incrimination clause protect a person's private papers.[20] Thus, the Supreme Court in *Boyd* held that a major basis for the fifth amendment right against self-incrimination was concern for individual privacy and property rights.[21] Justice Bradley's opinion in *Boyd* explicitly drew books and papers into the fifth amendment's range of protection against compelled self-incriminating testimony, stating that the Court did not view the seizure of books and papers that could be used as evidence against a person as substantially different from compelling a person to testify against himself.[22] This analysis would protect as compelled testimony books and papers entered into evidence over a witness's objection whether those papers were acquired under the compulsion of a subpoena or with a search warrant.[23]

Courts and commentators generally agree that the fundamental goal of the privilege against self-incrimination is preservation of the adversarial or accusatorial, as opposed to inquisitorial, nature of the criminal justice system.[24] The Supreme Court has stated repeatedly in the years since *Boyd*

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20. *Id.* at 634-35. The fourth amendment provides:

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

U.S. CONST. amend. IV. *Boyd* established in this country an interpretation of the right to be free from governmental search and seizure which was based on private property rights. This rationale was adopted from the English case of Entick v. Carrington, 19 Howell's State Trials 1029, 1063-68 (1765), wherein Lord Camden reasoned that searches of private property violated the supremacy of the owner's property rights. Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461, 463-64 (1981). The private property basis first stated in *Boyd* became better known as the "mere evidence rule." Under the mere evidence rule only contraband or fruits and instrumentalities of a crime were subject to seizure because these were the only items in which the individual did not have a property interest superior to that of the state. This protection of private property also functioned to protect privacy in general. *Id.* at 465-66. The mere evidence rule was abolished in Warden v. Hayden, 387 U.S. 294, 309-10 (1967), which held that the fourth amendment permits searches for mere evidence. *Warden* and the cases following it have significantly broadened the scope of what may be permissibly searched for upon a proper showing of probable cause and specificity. Bradley, *supra*, at 462.

21. 116 U.S. at 630.

22. *Id.* at 633. *Boyd*'s close identification of fourth amendment searches and seizures and the fifth amendment's privilege against self-incrimination has resulted in much debate and confusion over how best to analyze the case and its progeny. *Compare* Gerstein, *The Demise of* Boyd*: Self Incrimination and Private Papers in the Burger Court*, 27 U.C.L.A. L. REV. 343, 356-73 (1979) (discussing the problems resulting from *Boyd*'s analysis that a combination of the fourth and fifth amendments protected private books and papers), *with* Bradley, *supra* note 20, at 465 (analyzing *Boyd* as drawing a clear distinction between the fourth and fifth amendment bases of protection of private papers), *and* Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 955-56 (1977) (viewing *Boyd*'s analysis as merely highlighting the significant overlap in protection provided by the two amendments).

23. *See* Note, *supra* note 22, at 945-46.

24. C. WHITEBREAD, *supra* note 2, at 255; *see* Malloy v. Hogan, 378 U.S. 1, 7 (1964); 8 J. WIGMORE, EVIDENCE § 2251, at 295 n.1 (McNaughton rev. 1961); *cf.* Watts v. Indiana, 338 U.S. 49, 54 (1949) (due process case). Under an inquisitorial criminal justice system the government may interrogate the accused in order to establish its case against him. Under an

that underlying that goal is the protection of privacy.[25] One of the ways the concern for privacy has manifested itself in fifth amendment jurisprudence is the Supreme Court's repeated statements that papers are protected from forced disclosure.[26] Recent cases, however, have attenuated the protection of privacy available under the fifth amendment. These cases are notable for their narrow definition of what constitutes testimony as well as for their technical conception of how compulsion must relate to the creation of the testimony and the person likely to be incriminated.

The first of these cases is *Schmerber v. California*.[27] In *Schmerber* the petitioner was arrested for drunk driving and taken to a hospital. There a police officer directed a physician to withdraw a blood sample from the petitioner in order to test chemically for intoxication. The petitioner was subsequently tried on charges of driving while under the influence of intoxicating liquor. The trial court allowed introduction of the blood analysis report despite the petitioner's fifth amendment objection. On appeal, the Supreme Court held that in order for the fifth amendment to protect the accused, the evidence sought must be of a testimonial or communicative nature.[28] The Court further held that an involuntary blood test did not constitute such compelled testimonial evidence.[29] After refusing to equate blood obtained involuntarily from an accused's body with compelled testimony, the Court conceded that the line between testimonial evi-

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accusatorial system such interrogation, even under judicial safeguards, is forbidden. The government must carry the burden of proving its charge against the accused by evidence independently obtained through investigations. *Id.*

25. *See, e.g.*, Couch v. United States, 409 U.S. 322, 327 (1973) (the privilege respects a private sanctum of feeling and thought); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (fifth amendment creates a zone of privacy); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (the privilege respects the right to a private enclave). *But see* Gerstein, *supra* note 22, at 345-56 (the author details his contention that the historical purpose of the privilege is the preservation of the moral autonomy of the individual and that all other policies are protected only when they effect that goal). In *Murphy* Justice Goldberg espoused an exhaustive and eloquent listing of the policies generally held to underlie the right against self-incrimination:

> It [the privilege against self-incrimination] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load" . . . ; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life" . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Murphy v. Waterfront Comm'n, 378 U.S. at 55 (citations omitted).

26. *E.g.*, Bellis v. United States, 417 U.S. 85, 87 (1974); Couch v. United States, 409 U.S. 322, 330 (1973); Schmerber v. California, 384 U.S. 757, 763-64 (1966).

27. 384 U.S. 757 (1966).

28. *Id.* at 761.

29. *Id.*

dence and physical evidence might be hard to draw.[30] Nevertheless, while the Court seemed to be mandating a narrow definition of testimony,[31] the majority expressly rejected the view that the privilege is limited to testimony extracted from a person's own lips[32] and expressly approved the continued validity of *Boyd* by stating that one's papers are privileged testimonial communications.[33] Despite its continuation of protection for private papers, the Court's refusal to protect physical invasion of the human body dealt a blow to *Boyd*'s broad privacy-based fifth amendment protections.[34]

Seven years after *Schmerber* the Supreme Court considered the breadth of the privacy basis of the fifth amendment in *Couch v. United States*.[35] In *Couch* a taxpayer challenged a summons issued to her accountant that demanded production of the taxpayer's records. The accountant had possession of the records because he had used them in preparing the taxpayer's income tax returns. *Couch* addressed the question of whether a taxpayer's right against self-incrimination protects her personal tax records when their production is demanded of a third party who has possession of the documents.[36] The Court expressly stated that the fifth amendment protects privacy,[37] but held that the taxpayer had no legitimate expectation of privacy because she had turned over the papers to the accountant.[38] The Court adhered to a narrow definition of compulsion and reasoned that the question of who compiled or held title to the records is irrelevant.[39] If the demand to produce the records is not aimed at the person tending to be incriminated, the compulsion element of the fifth amendment is not met, and the records must be produced by the third party who possesses them.[40] The Court did not overrule *Boyd*, but, rather, read that case to refer to protection of papers in one's own possession.[41]

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30. *Id.* at 764.

31. *Id.* at 775-76 (Black, J., dissenting). Justice Black argued that an analysis of the accused's blood is capable of communicating guilt to the court and jury. He contended that the majority in *Schmerber* failed to give the fifth amendment the liberal construction that other decisions of the Court had stated was essential in order to protect the right against self-incrimination. *Id.*

32. *Id.* at 763 n.7 (quoting and refusing to adopt the view expressed in 8 J. WIGMORE, EVIDENCE § 2263 (McNaughton rev. 1961) that 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" (emphasis by the Court)).

33. 384 U.S. at 763-64.

34. *See id.* at 775 (Black, J., dissenting).

35. 409 U.S. 322 (1973).

36. *Id.* at 327.

37. *Id.*

38. *Id.* at 335-36. The Court reasoned that much of the information in the papers would be disclosed in an income tax return and that the discretion whether to disclose certain information lay largely with the accountant rather than the taxpayer herself. *Id.* at 335.

39. *Id.* at 331, 336.

40. *Id.* at 336.

41. *Id.* at 330-31. Some commentators have read the *Couch* decision as significantly narrowing the privacy rationale of *Boyd*. *See* Gerstein, *supra* note 22, at 374; Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, 95 HARV. L. REV. 683, 693 (1982). The majority in *Couch*, however, drew upon earlier declarations of the Court such as Mr. Justice Holmes's statement: " 'A party is

More recently the Supreme Court analyzed the scope of fifth amendment protection of documents in *Fisher v. United States*[42] and *Andresen v. Maryland*.[43] In *Fisher* the Internal Revenue Service issued a summons requiring the production of tax documents that had been prepared by the taxpayer's accountant. The accountant had compiled the documents from the taxpayer's personal financial records, and the taxpayer sought to avoid the summons by claiming his fifth amendment right against self-incrimination. On appeal the Supreme Court held that the records were not privileged because their production would not involve incriminating testimony.[44] The Court acknowledged that courts had consistently interpreted *Boyd* as preventing compelled production of incriminating documents.[45] Nevertheless, the *Fisher* majority dealt a major blow to that interpretation by declaring that because so much of *Boyd*'s rationale had been discredited,[46] the prohibition against compelled production of private papers must be reevaluated.[47] The Court concluded that the tax records at issue were not the taxpayer's testimonial communications because they were not prepared by the taxpayer.[48] The Court also stated that since the papers were voluntarily created, their contents could not be considered

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privileged from producing the evidence but not from its production.' " *Couch*, 409 U.S. at 328 (quoting Johnson v. United States, 228 U.S. 457, 458 (1913)).

42. 425 U.S. 391 (1976). *Fisher* is a consolidation of two cases; factual references herein are to the appeal of United States v. Fisher, 500 F.2d 683 (3d Cir. 1974).

43. 427 U.S. 463 (1976).

44. 425 U.S. at 414. The records were actually in the possession of the taxpayer's attorney, but the Court held that if an attorney-client relationship existed, and if the client himself could have refused to produce the records by claiming his fifth amendment right, then the attorney-client privilege allowed the attorney to invoke the taxpayer's right and resist production of the records. Thus, the relevant question was whether the documents could have been obtained by a subpoena addressed to the taxpayer while the documents were in his possession. 425 U.S. at 403-05.

45. *Id.* at 408. One of the cases the Court cited was Bellis v. United States, 417 U.S. 85 (1974). In *Bellis* the Court held that a partner in a small law firm may not invoke his personal fifth amendment privilege in refusing to produce the partnership's financial records. *Id.* at 101. At the same time that it further limited availability of the privilege to organizational entities, the *Bellis* opinion reiterated *Boyd*'s holding that the fifth amendment protects an individual's personal and business papers. The Court stated: "The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life." *Id.* at 87-88.

46. 425 U.S. at 407-09. Specifically the Court pointed out that courts had virtually abandoned *Boyd*'s property-based analysis of the fourth amendment whereby the government was forbidden to seize an individual's personal property merely for evidentiary purposes. *Id.* at 407 (citing Hale v. Henkel, 201 U.S. 43 (1906); Warden v. Hayden, 387 U.S. 294 (1967)). The Court also noted that recent decisions had allowed the seizure and use of "testimonial" evidence. *Id.* at 407-08 (citing Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); Osborn v. United States, 385 U.S. 323 (1966)).

47. 425 U.S. at 409. The majority interpreted the fifth amendment basis of *Boyd* as deriving from the fourth amendment holding of that case rather than as an independent basis for the protection of private documents. They concluded, therefore, that the rule announced in *Boyd* forbidding the forced production of private papers "has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment." *Id.* at 409. The statement of the Court in *Boyd* that "the fourth and fifth amendments run almost into each other," 116 U.S. at 630, has caused much debate over the proper interpretation of the *Boyd* holding and rationale. *See supra* note 22.

48. 425 U.S. at 409.

compelled testimony under the fifth amendment because only the act of production was compelled, not the creation of the documents themselves.[49] The Court did acknowledge that the act of production of itself has communicative aspects because compliance with the subpoena concedes the existence of the papers, their possession or control by the taxpayer, and the taxpayer's belief that they are the papers requested.[50] The Court reasoned that such tacit admissions may, in some circumstances, be considered sufficiently testimonial and incriminating to warrant fifth amendment protection.[51] The Court's analysis made clear, however, that the protected aspects of the compelled production do not include the contents of the documents.[52] The majority opinion in *Fisher* explicitly refused to answer the question of whether and to what extent the fifth amendment would protect private papers from compelled production.[53] The heavy emphasis on voluntary preparation, however, clearly suggested that private papers would be subject to the same analysis.[54]

Fisher represented a major shift in fifth amendment interpretation. The Court paid lip service to the privacy principles underlying the fifth amendment,[55] but indicated that only the fourth amendment protects uncompelled self-incriminating testimony on privacy grounds.[56] Thus, the Court clearly focused its fifth amendment analysis on the technical process of compulsion. *Couch* had emphasized the importance of the compulsion re-

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49. *Id.* at 409-10.

50. *Id.* at 410.

51. *Id.* The Court noted that the question of whether the tacit admissions inherent in the act of production warrant fifth amendment protection is one that "perhaps" should be answered based on the facts of each case rather than categorically. The Court refused to say explicitly that the determination must be made on a case-by-case basis and did not, therefore, rule out the possibility that a categorical answer might be formulated and applied at a later date. In *Fisher* the Court concluded that such admissions did not involve testimonial self-incrimination and, accordingly, were not protected. The Court based that conclusion on the determination that the government was not relying on any tacit admissions by the taxpayer because the existence and location of the documents were already known. *Id.* at 410-11.

52. *Id.* at 409-10; *see* C. WHITEBREAD, *supra* note 2, § 14.06, at 279; *see also* Gerstein, *supra* note 22, at 379 n.194 (criticizing the *Fisher* majority's complete refusal to consider the character of the documents in determining whether the act of production warrants fifth amendment protection).

53. 425 U.S. at 414. The issue was not technically before the Court because the tax records in question were neither prepared by the taxpayer nor in his possession.

54. *See* C. WHITEBREAD, *supra* note 2, § 14.06, at 280; Ritchie, *supra* note 18, at 395.

55. 425 U.S. at 399.

56. After stating that the fifth amendment protects only compelled testimony regardless of whether such testimonial evidence is private in nature, the Court in *Fisher* explained that only the fourth amendment protects, on privacy grounds, potentially incriminating private information that does not involve compelled testimony. *Id.* at 400-01. The majority interpreted the specific inclusion of privacy interests in the fourth amendment and the lack of mention of privacy interests in the fifth amendment as evidence of the framers' intent to protect privacy only by way of the fourth amendment. *Id.* The Court indicated that if the state proves that probable cause exists and complies with the fourth amendment's specificity requirements, then the state can properly invade privacy to obtain the evidence. *Id.* at 400. Thus, if documents do not fit within the definition of compelled testimony, the state may obtain them by a subpoena or search warrant properly obtained under the fourth amendment. Fourth amendment compliance forecloses further consideration of privacy issues.

quirement and *Schmerber* had confirmed the requirement that in order to be protected the evidence must be testimonial in nature. *Fisher* brought together these two requirements in its mandate that the incriminating testimony be the result of the compulsion exerted by the state.[57] The *Fisher* majority concluded that when the documents are created voluntarily, the only thing compelled is the act of production, which must, therefore, be testimonial in order to be protected.[58] This shift from considering the testimonial content of the documents to considering the testimonial elements of the act of production was a completely new approach to the analysis of document production.[59] Both Justice Marshall and Justice Brennan wrote separate opinions in *Fisher* to criticize the Court's new approach. Justice Brennan was extremely dissatisfied with the summary treatment afforded the "bedrock premise of privacy"[60] and was fearful that the majority's opinion might foreshadow the end of fifth amendment protection for private papers.[61] Justice Marshall, while critical of the new theory, expressed hope that it would provide substantially the same privacy protection as the traditional content analysis.[62]

Two months after the *Fisher* decision, in *Andresen v. Maryland*,[63] the Supreme Court refused to grant fifth amendment protection to an attorney's business records seized from his office pursuant to a valid search warrant.[64] The Court reasoned that the petitioner was not asked to say or do anything to contribute to the state's acquisition of the incriminating evidence and that, therefore, no compulsion within the meaning of the fifth amendment existed.[65] The short shrift given to *Boyd* and the privacy rationale[66] in *Andresen* continued *Fisher*'s break with the past and seems to have eliminated fifth amendment protection for papers obtained in a valid search and seizure.[67] As the Court noted, however, it had previously addressed the requirement of compulsion directed toward forcing the accused to contribute actively to the case against him.[68]

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57. *See* McKenna, *supra* note 18, at 66-67; Note, *supra* note 22, at 972-77.

58. 425 U.S. at 409-10.

59. *Id.* at 430 (Marshall, J., concurring). For example, the testimonial nature of one's papers was viewed as sufficient to protect them from compelled production in Schmerber v. California, 384 U.S. 757, 763-64 (1966), and Bellis v. United States, 417 U.S. 85, 87-88 (1974). *Fisher* was the first case in which the Court held that compelled revelation by the individual of incriminating testimony found in his records is not protected by the fifth amendment. C. WHITEBREAD, *supra* note 2, § 14.06, at 279.

60. 425 U.S. at 416 (Brennan, J., concurring).

61. *Id.* at 415.

62. *Id.* at 432 (Marshall, J., concurring). Marshall reasoned that recognition of the testimonial aspects of production, particularly verification of the existence of the documents, should afford special protection to private papers because it would rarely be valid for the state to assume the existence of truly private papers. *Id.* at 432-33.

63. 427 U.S. 463 (1976).

64. *Id.* at 477.

65. *Id.* at 473-74.

66. *Id.* at 477.

67. *See* Bradley, *supra* note 20, at 473; McKenna, *supra* note 18, at 60-61. *Andresen*, like *Fisher*, involved business records as opposed to truly private papers. Bradley, *supra* note 20, at 473-74.

68. 427 U.S. at 473-74 (citing Johnson v. United States, 228 U.S. 457, 458 (1913); see

Fisher and *Andresen* significantly reduced the importance of the fifth amendment's privacy protection by ignoring the testimonial attributes of the documents themselves and focusing instead on a narrow, technical definition of compulsion.[69] *Andresen* drew a technical distinction between the compulsion inherent in a subpoena requiring one to produce documents and the compulsion inherent in a search warrant requiring one to stand and watch their seizure.[70] *Fisher* viewed as compelled only testimony created simultaneously with the compulsion imposed by the state.[71] The *Fisher* standard ignored the testimonial contents of preexisting documents and protected only the testimonial aspects of the act of production.[72]

II. *UNITED STATES V. DOE*

In *United States v. Doe* the Supreme Court clarified and reaffirmed the holdings and rationale of *Fisher* and *Andresen.* The question facing the Court in *Doe* was whether, and to what extent, the fifth amendment protects the business records of a sole proprietorship.[73] The majority opinion, written by Justice Powell,[74] first recognized that *Fisher* did not reach the question of whether the fifth amendment privilege protects the contents of an individual's records in his possession,[75] but the majority noted that the rationale in that case was, nevertheless, controlling.[76] The Court stated that the fifth amendment prevents only compelled self-incrimination and, when the preparation of business records is voluntary, no compulsion is present with regard to their content.[77] In addition, the Court made it clear that the contents of documents do not receive any secondary protection due to the fact that they are requested under a subpoena since a subpoena ordinarily does not compel an individual to restate, repeat, or affirm that the documents' contents are true.[78]

In *Doe* the Court once again recognized the idea that the fifth amendment should be regarded as a protector of individual privacy shielding personal records from compelled production while undercutting any practical effect such an idea might have. The majority opinion essentially begged

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Mr. Justice Holmes's quotation from this case, *supra* note 41); *see* Couch v. United States, 409 U.S. 322, 327-28 (1973); Marron v. United States, 275 U.S. 192, 194 (1927); Gouled v. United States, 255 U.S. 298, 306 (1921).

69. C. WHITEBREAD, *supra* note 2, § 14.06, at 279-80.

70. 427 U.S. at 485, 486 (Brennan, J., dissenting).

71. *See supra* notes 57-59 and accompanying text; Note, *supra* note 41, at 685.

72. Note, *supra* note 41, at 685; *see also* Ritchie, *supra* note 18, at 397 (disregarding the testimonial nature of private papers artificially distinguishes between compelling a person to reveal his thoughts by speaking and compelling him to reveal his written thoughts).

73. 104 S. Ct. at 1239, 79 L. Ed. 2d at 556.

74. Chief Justice Burger and Justices White, Blackmun, Rehnquist, and O'Connor joined the opinion of the Court.

75. 104 S. Ct. at 1241, 79 L. Ed. 2d at 558-59.

76. *Id.*, 79 L. Ed. 2d at 559.

77. *Id.*

78. *Id.* (citing Fisher v. United States, 425 U.S. 391, 409 (1976)). Contrast the restatement referred to here, which might, if present, protect the *contents* of the documents, with the tacit compelled testimony inherent in the *act* of production, which is itself protected, but does not serve to protect the documents' contents.

the question by restating the conclusion reached in *Fisher* that, while the privilege serves privacy interests, the Court has never, even for the protection of personal privacy, "applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort."[79] Citing *Schmerber v. California* and *Andresen v. Maryland* as key cases, the Court reemphasized its gradual move away from the broad policy-based principles first stated in *Boyd v. United States*.[80] The majority recognized that although this movement was essentially completed in *Fisher*, the different courts of appeals had not uniformly applied the reasoning of that case.[81] In *United States v. Doe* the Court left no doubt about the approach required to apply the privilege to the contents of documents. The Court applied definitively the reasoning of *Fisher*, stating that in order for the contents of documents to be protected, their preparation must be compelled or the person claiming the privilege must be compelled to restate, repeat, or reaffirm the truth of their contents.[82] No compulsion exists if the party asserting the fifth amendment privilege has voluntarily compiled the documents.[83] Because the Supreme Court was of the opinion that the court of appeals had held that the fifth amendment protected the documents, it reversed that portion of the court of appeals decision.[84]

Next, the Court considered fifth amendment protection of the act of producing the documents in response to a subpoena. The Court restated the *Fisher* conclusion that although the contents of a document may not be privileged, the act of producing the document may be.[85] The majority repeated the *Fisher* reasoning to the effect that compliance with a subpoena is potentially self-incriminating testimony because the act of delivery concedes the existence of the papers, their possession or control by the witness, and the witness's belief that the papers produced are the ones sought.[86] The majority went on to contrast the application and analysis of those elements of compulsion in *Fisher* with the facts of *Doe*.[87] The Court in *Doe* relied heavily on the district court's finding that the act of producing the

79. 104 S. Ct. at 1241 n.8, 79 L. Ed. 2d at 559 n.8 (citing Fisher v. United States, 425 U.S. 391, 399 (1976)).

80. 104 S. Ct. at 1241 n.8, 79 L. Ed. 2d at 559 n.8.

81. *Id.* at 1241-42 & nn.9&10, 79 L. Ed. 2d at 559-60 & nn.9&10. *See, e.g., In re* Grand Jury Subpoena (Kent), 646 F.2d 963, 970 (5th Cir. 1981) (fifth amendment protects business records of a sole proprietorship); *In re* Grand Jury Proceedings (Johanson), 632 F.2d 1033, 1042-44 (3d Cir. 1980) (fifth amendment protects defendant's personal appointment books because of rightful expectation of privacy with respect to those papers); *In re* Grand Jury Proceedings (Martinez), 626 F.2d 1051, 1058 (1st Cir. 1980) (subpoena ordering production of defendant physician's appointment books must be complied with so long as fact of compliance itself not used against defendant); *see also* Note, *supra* note 41, at 686-94 (analyzing the cases cited above).

82. 104 S. Ct. at 1242, 79 L. Ed. 2d at 559-60.

83. *Id.* at 1241, 79 L. Ed. 2d at 559.

84. *Id.* at 1245, 79 L. Ed. 2d at 563.

85. *Id.* at 1242, 79 L. Ed. 2d at 560.

86. *Id.*

87. *Id.* at 1242-43, 79 L. Ed. 2d at 560-61.

documents would involve testimonial self-incrimination.[88] In declining to overturn that finding, which the majority noted was affirmed by the court of appeals,[89] and in keeping with that finding, the Court held that in this case the act of producing the documents would have sufficient testimonial value to warrant fifth amendment protection.[90] The Court noted that the hazards of incrimination must be substantial before a party can claim the fifth amendment privilege.[91] The district court's finding indicated that this was such a case. The Supreme Court pointed out, however, that the government could have rebutted such a finding by producing evidence that possession, existence, and authentication were a foregone conclusion.[92]

The last issue the Court considered was that of use immunity.[93] At both the district and the appellate court levels the government maintained that the court should order production of the documents because the government promised not to use the witness's act of production against him in any way. Despite this promise the government refused to comply with the statutory requirements for formal use immunity.[94] Instead it urged the Court to impose a form of constructive use immunity that would forbid the use of the incriminating aspects of the act of production against the person claiming the privilege despite the lack of formalities.[95] The Court refused to recognize constructive use immunity because to do so would be to extend unacceptably the jurisdiction of the courts.[96] The Court noted that

88. *Id.* The Court characterized the district court finding as essentially one of fact.

89. *Id.* at 1243, 79 L. Ed. 2d at 561.

90. *Id.* at 1245, 79 L. Ed. 2d at 563.

91. *Id.* at 1243 n.13, 79 L. Ed. 2d at 561 n.13 (citing Marchetti v. United States, 390 U.S. 39, 53 (1968)).

92. 104 S. Ct. at 1243 n.13, 79 L. Ed. 2d at 561 n.13 (citing Fisher v. United States, 425 U.S. 391, 411 (1976)).

93. An individual may not assert his fifth amendment right against self-incrimination if no threat of incrimination exists. A governmental grant of use immunity removes the threat of incrimination by forbidding the use of the immunized testimony and any evidence derived therefrom. The other type of immunity is transactional immunity, which protects the individual from prosecution for any activity mentioned in the immunized testimony. Use immunity is the more valuable prosecutor's tool because, while it forbids the use of certain testimony and evidence, it does not completely bar prosecution. The Supreme Court first approved the concept of statutes authorizing immunity in 1892 in Counselman v. Hitchcock, 142 U.S. 547 (1892), and approved statutory use immunity in Kastigar v. United States, 406 U.S. 441 (1972). The statutes that detail the procedures required for conferral of use immunity at the federal level are 18 U.S.C. §§ 6002, 6003 (1982). *See generally* C. WHITEBREAD, *supra* note 2, § 14.04, at 261-63 (discussing the history of immunity and its effect on the fifth amendment privilege).

94. *In re* Grand Jury Empanelled March 19, 1980, 541 F. Supp. 1, 3 (D.N.J. 1981), *aff'd*, 680 F.2d 327, 337 (3d Cir. 1982).

95. 104 S. Ct. at 1244, 79 L. Ed. 2d at 562. Apparently, precedent for the type of constructive use immunity sought by the government in *Doe* does not exist. Precedent, however, can be found for the courts to grant immunity to testimony obtained either in violation of the witness's fifth amendment rights, United States v. Mandujano, 425 U.S. 564, 576 (1976), or by a promise of immunity that the witness reasonably believed, but that was not properly requested by the government, United States v. Winter, 663 F.2d 1120, 1133 (1st Cir. 1981), *cert. denied*, 103 S. Ct. 1250, 75 L. Ed. 2d 479 (1982); United States v. Soc'y of Indep. Gasoline Marketers of Am., 624 F.2d 461, 469 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981).

96. 104 S. Ct. at 1244, 79 L. Ed. 2d at 562. The Court relied heavily on a 1983 decision, *Pillsbury Co. v. Conboy*, which held that new testimony may be compelled only after a new,

Congress left the decision of whether the grant of use immunity is beneficial in a given case to the prosecutorial discretion of the Justice Department.[97] Because the Justice Department's case against an individual may be either helped or hindered by a grant of immunity, the Court decided that it would not infringe on the Justice Department's right even if invited to do so.[98] Should the government want to pursue immunity, the Court reiterated that the procedures to do so are in place and readily available to it at any time.[99] One critical point that the Court made clear with regard to use immunity is that because only the act of production is protected, only the use of testimony inherent in that act must be immunized.[100] The contents of the documents are not protected because they were not compelled.

The Supreme Court's majority opinion in *Doe* prompted several responses. Justice Stevens, concurring in part and dissenting in part, emphatically criticized the majority's decision regarding the nonprivileged status of the contents of the documents.[101] In Justice Stevens's opinion, the court of appeals had merely affirmed the district court's holding that production could not be compelled because the act of production was sufficiently testimonial in nature to warrant fifth amendment protection.[102] In support of his opinion that the court of appeals never held the contents of the documents privileged, Justice Stevens quoted the court of appeals' statement that the documents themselves do not contain compelled testimony but the act of production might contain such testimony.[103] The majority noted Justice Stevens's dissent and reemphasized its belief that the Third Circuit did hold the records themselves privileged.[104] The majority pointed out that both parties to the suit agreed with that characterization of the court of appeals decision.[105]

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formal request for use immunity is granted, despite the fact that the new testimony tracks prior immunized testimony. Pillsbury Co. v. Conboy, 103 S. Ct. 608, 617-18, 74 L. Ed. 2d 430, 444 (1983).

97. 104 S. Ct. at 1244, 79 L. Ed. 2d at 562.

98. *Id.*, 79 L. Ed. 2d at 563.

99. *Id.* The use immunity statute, 18 U.S.C. §§ 6002-6003 (1982), provides that the prosecuting United States attorney may request an order requiring an individual to give testimony or provide information if he refuses to do so based on his fifth amendment right against self-incrimination. The United States attorney may request such an order when he believes that the information or testimony is necessary to the public interest. *Id.* § 6003. Section 6002 provides that when such an order has been issued, the individual must give the required information or testimony and that any information so provided may not be used against the individual in any criminal case, except a prosecution for perjury. *Id.* § 6002.

100. 104 S. Ct. at 1244 n.17, 79 L. Ed. 2d at 563 n.17.

101. *Id.* at 1246-48, 79 L. Ed. 2d at 564-67.

102. *Id.* at 1247, 79 L. Ed. 2d at 565.

103. *Id.*, 79 L. Ed. 2d at 565-66. Despite the language quoted by Justice Stevens, one could argue that the court of appeals' holding was based in part on the belief that the documents were privileged. The Third Circuit spent a lengthy portion of its opinion discussing not only the relationship between the documents of a sole proprietorship and personal papers, 680 F.2d at 330, but also its belief that, despite *Fisher*, the fifth amendment protects the contents of private papers and business records of a sole proprietorship. *Id.* at 331-34.

104. 104 S. Ct. at 1240 n.6, 1245 n.18, 79 L. Ed. 2d at 558 n.6, 563 n.18.

105. *Id.* at 1240 n.6, 79 L. Ed. 2d at 558 n.6.

Justice O'Connor and Justice Marshall also wrote separately in disparate opinions that reflect their authors' different interpretations of the purpose of the fifth amendment. Justice O'Connor wrote a brief concurrence to clarify the point she perceived to be only implied in the majority's opinion: that the fifth amendment provides "absolutely no protection" for the contents of any private papers.[106] This assertion is supported by the shift in the Court's focus, as reflected in *Fisher* and *Andresen* and confirmed in *Doe*, from a focus on the nature and content of documents to a focus on testimony inherent in the action compelled.[107] Justice Marshall's opinion, concurring in part and dissenting in part, was joined by Justice Brennan and essentially mirrored Justice Stevens's concerns.[108] Justice Marshall challenged Justice O'Connor's assertion that the fifth amendment does not extend to private papers of any kind.[109] He asserted that the majority opinion did not reconsider whether the fifth amendment provides protection for the contents of private papers[110] and pointed out that the documents involved in *Doe* were business records involving a lesser concern for privacy than truly private papers such as personal diaries.[111] He reiterated his belief that certain documents should not be required to be produced at the government's request.[112]

Despite the fact that *Doe* did not involve private papers of a personal nature, Justice O'Connor is correct to the extent that the Court has set up the mechanism to refuse fifth amendment protection to such highly personal writings as private diaries. The fundamental ethical problems involved in allowing the government access to such papers for the purpose of using them against the individual in criminal proceedings, however, remain unaddressed.[113] Although the Court has hinted that such papers might be protected on alternative bases,[114] it has not clearly stated or de-

106. *Id.* at 1245, 79 L. Ed. 2d at 563.

107. *See supra* notes 69-72, 81-83, and accompanying texts.

108. *Id.* at 1245-46, 79 L. Ed. 2d at 564.

109. *Id.*

110. *Id.* at 1245, 79 L. Ed. 2d at 564.

111. *Id.* at 1246, 79 L. Ed. 2d at 564.

112. *Id.* (citing Fisher v. United States, 425 U.S. 391, 431-32 (1976) (Marshall, J., concurring)).

113. *See* Justice Brennan's concurrence in *Fisher*, in which he stated:

> An individual's books and papers are generally little more than an extension of his person. They reveal no less than he could reveal upon being questioned directly. Many of the matters within an individual's knowledge may as easily be retained within his head as set down on a scrap of paper. I perceive no principle which does not permit compelling one to disclose the contents of one's mind but does permit compelling the disclosure of the contents of that scrap of paper by compelling its production. Under a contrary view, the constitutional protection would turn on fortuity, and persons would, at their peril, record their thoughts and the events of their lives. The ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or the events of those memories would become the subjects of criminal sanctions however invalidly imposed.

425 U.S. 391, 420 (1976).

114. In Fisher v. United States, 425 U.S. 392, 401 (1976), the Court listed other potential protections for private papers. Those protections are as follows: (1) fourth amendment

veloped such alternative protections. In both *Fisher* and *Andresen* the Court specifically noted that the documents involved were business rather than private papers. In *Doe* the Court worded its holding to apply to business records.[115] No Supreme Court majority opinion has yet expressly denied fifth amendment protection to truly private incriminating papers, but neither has the Court offered a rationale for how private papers could be protected that is consistent with the emphasis on compulsion.[116]

III. CONCLUSION

In *United States v. Doe* the Supreme Court held that although the fifth amendment right against self-incrimination does not protect the contents of the sole proprietorship's business records, it may protect the act of producing those records in response to a subpoena. The Court based its finding in *Doe* that the act of production was sufficiently testimonial to warrant fifth amendment protection largely on the district court's finding of fact to that effect. The Court, however, made clear how very narrow such protection can be when it instructed that a grant of use immunity, immunizing only the testimonial aspects of the act of production, will require production of the papers sought, the contents of which will remain completely unprotected. The Court's dismissal of respondent Doe's reliance on the privacy basis of the fifth amendment washed away the last vestiges of *United States v. Boyd*'s long-standing idea that protection of privacy lies close to the heart of the fifth amendment. In its place the Court reiterated the rationale of *Fisher v. United States*, with its heavy emphasis on the conclusion that the fifth amendment does not protect voluntarily prepared documents because their contents are not compelled. This focus on the process of compulsion instead of the nature of the document's contents would not seem to support a content-based distinction giving protection to private papers but not to business papers. Nevertheless, because neither the facts nor the Court's opinion directly preclude it, the Court could draw such a distinction in the future.

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protection against unreasonable or overly broad searches; (2) the first amendment; and (3) evidentiary privileges. *Id.*; *see supra* note 56. Commentators also have suggested that private papers are protected from forced disclosure by the first and fourth amendments. *See* McKenna, *supra* note 18 at 67-72; Note, *supra* note 41, at 694-702.

115. 104 S. Ct. at 1241, 74 L. Ed. 2d at 559-60.

116. *See* Note, *supra* note 22, at 947.