Florida Law Review

Volume 29 | Issue 2 Article 10

January 1977

Constitutional Law: Search and Seizure of Private Business Records No Longer Supplies Compulsion Necessary to Invoke the Fifth Amendment

Henry B. Bolz

CONSTITUTIONAL LAW: SEARCH AND SEIZURE OF PRIVATE BUSINESS RECORDS NO LONGER SUPPLIES COMPULSION NECESSARY TO INVOKE THE FIFTH AMENDMENT

Andresen v. Maryland, 96 S. Ct. 2737 (1976)

In 1972 a Bi-County Fraud Unit investigating fraudulent real estate practices in the Washington, D.C. area concluded that there was probable cause to find that Peter Andresen, an attorney specializing in real estate settlements, had committed the crime of false pretenses.[1] The investigators applied for and received warrants to search the attorney's law office for specified documents pertaining to the sale of a lot in the Potomac Woods subdivision of Montgomery County, Maryland.[2] Approximately 3 percent of the law office files were taken, among them drafts of documents and handwritten memoranda.[3] The material taken was admitted into evidence and the jury found the attorney guilty of false pretenses and fraudulent misappropriation by a fiduciary. The Court of Special Appeals of Maryland affirmed the trial court's ruling that petitioner's fifth amendment rights had not been violated.[4] On certiorari,[5] the Supreme Court affirmed and HELD, the introduction into evidence of business documents seized during a valid search of the defendant's office does not violate the fifth amendment right against self-incrimination since the accused was not compelled to assist in the collection or authentication of testimony to be used against him.[6]

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1. "Any person who shall by any false pretense obtain from any other person any chattel, money or valuable security, with intent to defraud any person of the same, shall be guilty of a misdemeanor. . . ." MD. ANN. CODE art. 27, §140 (1957).

As the settlement attorney, petitioner took money from home purchasers giving assurances that the property purchased would be free and clear of all encumbrances. The purchasers did not receive clear title to the property as promised. Andresen v. Maryland, 96 S. Ct. 2737, 2741 n.1. (1976).

2. 96 S. Ct. at 2741. Petitioner's separate office, Mount Vernon Development Corporation, was searched concurrently with petitioner's law office. Petitioner was the sole shareholder and director of the corporation. *Id.*

3. Fifty-two items were taken from the corporate offices, 28 items from the law office. Of these only one item from the corporate office and five items from the law office were entered into evidence. The majority of the documents taken were returned to petitioner subsequent to a full suppression hearing before trial. *Id.* at 2741-42.

4. Andresen v. State, 24 Md. App. 128, 331 A.2d 78 (1975). Twenty-eight assignments of error, including petitioner's claim that both his fourth and fifth amendment rights had been violated, were heard by the appellate court. Four false pretense counts were reversed for failure to allege intent to defraud, all other assignments of error were denied. *Id.* at 134, 331 A.2d at 85.

5. Andresen v. Maryland, 423 U.S. 822 (1975).

6. 96 S. Ct. at 2747. The Court also held that the petitioner's fourth amendment rights were not violated by an overbroad general warrant. Petitioner alleged that the inclusion of the phrase "together with other fruits, instrumentalities and evidence of crime at this [time] unknown" in the warrant rendered it impermissibly general. *Id.* at 2748. The Court refused to read the phrase in isolation, but applied it in the context of the warrant as limited to documents pertaining to Lot 13T, the lot in question. *Id. See* KNOX, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 MO. L. REV. 1, 15-25 (1975).

The fifth amendment guarantees the individual's right not to be compelled to testify against himself. It assures that the state is required to prove the accused's guilt by independent means rather than by forcing an oral confession.[7] Designed to preclude the hated general warrants and writs of assistance issued by English officials, the fourth amendment guarantees to the individual the right to be free from unreasonable searches and seizures of his papers and effects.[8] Both amendments have been used to protect business records and confusion has arisen concerning their proper roles in protecting such documents.

Late in the nineteenth century both the fourth and fifth amendments were read together to create broad protection. In *Boyd v. United States*,[9] the fifth amendment was interpreted to extend to the production of documents.[10] The E.A. Boyd and Sons partnership was served with a *subpoena duces tecum* in a civil suit, requiring the production of an incriminating invoice. By law, failure to produce the invoice would be taken as a confession to the allegations of fraud.[11] Despite a claim that the forced production of the invoice violated the partnership's fifth amendment privilege, the partners produced the invoice and were found guilty.[12] The Supreme Court reversed the judgment on the theory that it violated the defendant's right against compulsory self-incrimination. The Court went beyond the issue presented to conclude that the fourth and fifth amendments merge to create a zone of privacy around private papers.[13] The Court noted that both subpoenas and searches supply the element of compulsion necessary to invoke fifth amendment protection.[14] Creating further protec-

7. *See* Michigan v. Tucker, 417 U.S. 433, 440 (1974). *See generally* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968).

8. *See* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13-48 (1937).

9. 116 U.S. 616 (1886). The E.A. Boyd and Sons partnership had contracted to supply the United States government wth 29 cases of foreign glass, on the understanding that any glass that came from the partnership's duty-paid inventory could be replaced by duty-free glass. The partnership subsequently imported 29 cases of glass duty-free and later represented that they were entitled to import 35 additional cases of glass duty-free. The government confiscated the second shipment, however, and ordered production of the partnership's invoice for the original 29 cases. Using the incriminating invoice against the Boyd partnership in a civil action, the government declared the 35 cases of glass forfeited. *Id.* at 617-18.

10. *Id.* at 633.

11. Amendment to the Customs-Revenue Law, 18 STAT. 187 §5 (1874), stated: "[I]f the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed . . . ." *Id.* at 620.

12. 116 U.S. at 618.

13. Justice Bradley, writing for the majority in *Boyd*, relied heavily on the English case Entick v. Carrington and Three Other King's Messengers, 19 Howell's State Trials 1029 (1765), to support the convergence theory of the fourth and fifth amendments. 116 U.S. at 626-30. *Entick* held that searches for evidence violate an individual's right against self-incrimination. Justice Bradley called the *Entick* decision the "very essence of constitutional liberty and security," and incorporated it into United States law. 116 U.S. at 630. For a thorough discussion of the convergence theory, see Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11, 13-17 (1925); Comment, *The Fourth and Fifth Amendments—Dimensions of an "Intimate Relationship"*, 13 U.C.L.A. L. REV. 857, 857-59 (1966).

14. Justice Bradley was "unable to perceive that the seizure of a man's private books and

tion for papers and property, the Court limited searches and seizures to the fruits of crime, instrumentalities of crime, and contraband; any other seized evidence compelled the defendant to incriminate himself and was inadmissible.[15]

Since the *Boyd* decision in 1886, the Court's holding and dicta have been gradually narrowed and overruled. The first encroachment came a few years later in *Hale v. Henkel*,[16] where the right against self-incrimination was restricted to natural individuals, thus removing fifth amendment protection from partnerships and corporations.[17] In another case, *Gouled v. United States*,[18] the Court codified the *Boyd* limitations on searches and seizures into the mere evidence rule,[19] which premised admissibility on some direct relationship between the evidence sought and the crime committed. The Court relaxed the absolute immunity that papers had enjoyed under *Boyd*, noting that papers could be used as either instrumentalities to perpetrate fraud and gambling offenses or that they could be forced or stolen. The Court declared that papers had "no special sanctity" from a search and seizure so long as the mere evidence rule was not violated and the papers were properly described in the warrant.[20] In 1966 the mere evidence rule was overturned in *Warden v. Hayden*,[21] because the exceptions to the rule were so numerous and confusing that the rule could no longer be justified.[22] The Court declined to apply fifth amendment prin-

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papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." 116 U.S. at 633.

15. *Id.* at 623-24. Unless the government could establish a primary right to the goods sought, such as the need to recover stolen goods, the search and seizure was presumptively unreasonable. Therefore, the evidence acquired was protected by the fifth amendment.

16. 201 U.S. 43 (1906).

17. Petitioner Hale was the Secretary/Treasurer for a company being investigated for Sherman Act violations. *Id.* at 46. Given personal immunity, Hale still refused to testify before a grand jury claiming that the company could be incriminated. Jailed for contempt, Hale sought release through a writ of habeas corpus. The Court denied the writ by strongly emphasizing the fact that the Bill of Rights was passed only to ensure individual, not corporate, rights. *Id.* at 69-70.

18. 255 U.S. 298 (1921).

19. *Id.* at 309. The purpose of the mere evidence rule was to preclude the use of warrants "solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found. . . ." *Id.* This primary right depended upon a governmental assertion "of a valid claim of superior interest" in the property sought. A superior property interest existed only when the object of the search was a fruit of crime (stolen goods or money), contraband (smuggled goods) or an instrumentality of crime (burglary tools or gambling paraphernalia). Warden v. Hayden, 387 U.S. 294, 303 (1967).

For a development of the mere evidence rule with respect to private papers, *see generally* Comment, *Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis*, 69 NW. U. L. REV. 626 (1974).

20. 255 U.S. at 309.

21. 387 U.S. 294 (1967).

22. *Id.* at 309. Criticism of the mere evidence rule began immediately after the *Gouled* decision. *See* Chafee, *The Progress of the Law 1919-1922*, 35 HARV. L. REV. 673, 694-704 (1922). As case law developed under the rule, the criticism became greater. *See, e.g.*, Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 477-78 (1961); Comment, *The Mere Evidence Rule: Doctrine or Dogma?*, 45 TEX. L. REV. 526 (1967) and

ciples to the mere evidence rule, limiting its holding to fourth amendment considerations.[23] Reading the fourth amendment's command as precluding only unreasonable searches, the Court stated that irrational distinctions between mere evidence and instrumentalities do nothing to further the protection of privacy that is the objective of the fourth amendment.[24]

Only one Supreme Court case since the *Boyd* decision has expressed the possibility that the fifth amendment right against compelled document production might be expanded. *Couch v. United States*[25] held that a summons for the accused's business and tax records did not violate the fifth amendment since the compulsion[26] was placed on the bookkeeper, not the accused. The Court noted, however, that if private documents were relinquished by the owner for only a short period of time, a subpoena served on the third person might not be valid because the accused retained constructive possession of the documents.[27]

Shortly after *Couch,* the Third and Fifth Circuit Courts of Appeal disagreed on the application of the doctrine of constructive possession to similar fact situations in which the accused tax evaders had given bookkeeping papers to their attorneys for legal advice.[28] These cases were consolidated in *Fisher v.*

Comment, *The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations,* 6 LOY. L.A.L. REV. 274, 278-84 (1973).

Outright exceptions to the rule included all corporate records, Hale v. Henkel, 201 U.S. 43 (1906), union records, United States v. White, 322 U.S. 694 (1944), and records required to be kept by the government, Shapiro v. United States, 335 U.S. 1 (1948). The courts throughout the country experienced difficulty distinguishing mere evidence from fruits and instrumentalities of crime. *Compare* Matthew v. Correa, 135 F.2d 534 (2d Cir. 1943) (address book called fruit and therefore admissible), *with* United States v. Lerner, 100 F. Supp. 765 (N.D. Cal. 1951) (address book inadmissible as mere evidence). *See also* Zap v. United States, 328 U.S. 624 (1946) (a cancelled check deemed admissible by the majority as a means of crime, *Id.* at 629, while the dissent classified it as mere evidence, *Id.* at 632-33). For an excellent analysis of these inconsistencies *see* Comment, *Limitations on Seizure of "Evidentiary" Objects—A Rule in Search of a Reason,* 20 U. CHI. L. REV. 319 (1953). For an analysis that supports the reasoning of the mere evidence rule when it is properly applied, *see* Note, *Evidentiary Searches: The Rule and the Reason,* 54 GEO. L.J. 593 (1966).

23. 387 U.S. at 302-03. The Court cited Schmerber v. California, 384 U.S. 757 (1966) as authority for the proposition that admission of clothing into evidence was not testimonial or communicative. See note 35 *infra.*

24. 387 U.S. at 304-06. This decision acknowledged a shift away from property protection to privacy protection as the primary role of the fourth amendment. The creation of the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914), and its subsequent development were given credit for this change. The requirement that the government must prove a primary right to property seized was termed a fiction; instead, the government's interest in law enforcement was declared sufficient.

25. 409 U.S. 322 (1973).

26. *Id.* at 328. The Court reiterated the fact that the fifth amendment privilege is personal. Unless compulsion is asserted on the accused, no fifth amendment privilege exists. *See generally* United States v. White, 322 U.S. 694, 701 (1944).

27. 409 U.S. at 333.

28. In United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974), the court of appeals reversed the trial court's decision to enforce a summons served on the accused's attorney. The lower court had ruled that no possessory interest in the documents belonging to the accused's bookkeeper had accrued in the accused and therefore no fifth amendment privilege existed for the attorney. *Id.* at 447.

United States[29] where the Supreme Court ruled that the papers involved in both cases belonged not to the accused taxpapers, but to their accountants; neither the attorneys nor their clients could claim a fifth amendment right for there was no incriminating testimony compelled from the accused.[30] In refusing to apply constructive possession, the Court reviewed the historical reasons for the passage of the fourth and fifth amendments. Concluding that the fourth amendment was directly aimed at personal privacy, the Court noted that the framers of the Constitution did not seek to protect privacy again in the fifth amendment but rather to protect only against compelled self-incrimination.[31] By this reasoning the convergence theory of the fourth and fifth amendments announced in *Boyd* was overruled.

In the instant case[32] the Supreme Court granted certiorari to resolve the question of whether a search and seizure supplies the compulsion necessary to invoke the fifth amendment, a question on which the lower courts were split.[33] The opinion defined the fifth amendment's historic function as a protection against compulsory incrimination through testimony or personal records.[34] Admitting that the seized documents in question were both incriminating and

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The Third Circuit Court of Appeals in United States v. Fisher, 500 F.2d 683 (3d Cir. 1974), affirmed the lower court's enforcement order in similar circumstances.

29. 96 S. Ct. 1569 (1976). *Fisher* reversed United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974) and affirmed United States v. Fisher, 500 F.2d 683 (3d Cir. 1974). *Id.* at 1582.

30. 96 S. Ct. at 1581.

31. *Id.* at 1575-76.

32. 96 S. Ct. 2737 (1976).

33. The Seventh Circuit in Hill v. Philpott, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), held that the fifth amendment protected Dr. Hill's business records seized pursuant to a warrant. The *Boyd* dicta that both a subpoena and a search and seizure supply the compulsion to invoke fifth amendment protection was cited as controlling. 445 F.2d at 146-149. The court cited 8 J. WIGMORE, EVIDENCE §2264 (McNaughton rev. 1961) as a strong argument for distinguishing between the compulsion of subpoenas and search and seizures. 445 F.2d at 147-149. However, the court declared that the difference between the two was "more shadow than substance" and that such a difference ignored "the realities of trial." *Id.* at 149. *See* Note, *Criminal Law — Search and Seizure — Seizure of Personal Records Violates the Fifth Amendment*, 46 TUL. L. REV. 545 (1972).

The substantial majority of lower courts, however, have recognized the validity of Wigmore's distinction. United States v. Blank, 459 F.2d 383 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972), characterized the distinction as critical in that a subpoena compels the accused to respond while no response at all is compelled by a search warrant. 459 F.2d at 385. *Accord*, Schaffer v. Wilson, 523 F.2d 175 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 3198 (1976) (no compulsion in seizure of dental records proving tax evasion); United States v. Murray, 492 F.2d 178 (9th Cir. 1973) (address book taken during search incriminating accused admissible); Taylor v. Minnesota, 466 F. 2d 1119 (8th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973) (seized letter describing prostitution admissible); United States v. Bennett, 409 F.2d 888 (2d Cir.), *cert. denied sub nom.*, Jessup v. United States, 396 U.S. 852 (1969) (letter taken from accused's pocket during search for narcotics admissible). The Maryland court of appeals in Andresen v. State, 34 Md. App. 128, 331 A.2d 78, 112 (1975), followed the majority reasoning: "The appellant seeks to box the State into the Fifth Amendment corner by invoking the ghost of Boyd v. United States. . . ." *Id.* at 133, 331 A.2d at 112. It referred to the "mystic union of the Fourth and Fifth Amendments" as "outdated legal fiction." *Id.* at 184, 331 A.2d at 112.

34. 96 S. Ct. at 2743. The definition was taken from Bellis v. United States, 417 U.S. 85, 89-90 (1974) (quoting United States v. White, 322 U.S. 694, 701 (1944)).

communicative, the Court focused on the critical issue of compulsion.[35] Petitioner's argument, based on statements in *Boyd* and *Hale*, was that seizure of private papers pursuant to a warrant supplied the compulsion necessary to invoke fifth amendment protection.[36] Characterizing these statements as broad, discredited dicta,[37] the Court instead cited the recent *Fisher* standard of compulsion. In both *Fisher* and the instant case the petitioners were not required to say or do anything during the search or at trial. Law officers searched for, discovered, seized, and produced the documents at trial where they were authenticated by a handwriting expert.[38] In no way was the petitioner required to be a witness against himself. The Court cited Justice Holmes' statement that "[a] party is privileged from producing the evidence but not from its production."[39]

The Court focused on three distinct points in time at which compulsion exerted on the accused would have allowed him to invoke the fifth amendment.[40] Examining these points, the Court found no fifth amendment compulsion. At the time the documents came into existence, the accused voluntarily committed his statements into writing.[41] During the period of actual search and seizure, the documents were discovered solely by the efforts of the law enforcement agents.[42] The accused was not asked to help or to supply information, and he was not compelled to take any affirmative act that would incriminate himself. At trial production of the documents and authentication of the accused's handwriting were done by the prosecution.[43] At no time from the

35. 96 S. Ct. at 2744. In a line of cases, the Court has held that an accused may be compelled to provide potentially incriminating evidence. United States v. Mara, 410 U.S. 19 (1973) (accused compelled to submit handwriting exemplar); United States v. Dionisio, 410 U.S. 1 (1973) (accused compelled to supply voice recording for voice print); United States v. Wade, 388 U.S. 218 (1967) (accused required to speak during line up); Schmerber v. California, 384 U.S. 757 (1966) (accused's blood taken without consent for Blood Alcohol Test). Thus, to compel incriminating evidence from the accused is constitutional so long as the evidence sought is not testimonial or communicative in nature. The fifth amendment is violated only when three elements exist together — compelled incriminating testimony. By conceding that the records taken from Andresen's offices were both incriminating and testimonial, the Court focused on the compulsion issue.

36. Brief for Petitioner at 21-22, Andresen v. Maryland, 96 S. Ct. 2737 (1976).

37. 96 S. Ct. at 2744.

38. *Id.* at 2745.

39. Johnson v. United States, 228 U.S. 457, 458 (1913). Mr. Justice Holmes made this statement when the accused objected to the entry of incriminating books owned by a third party.

40. 96 S. Ct. at 2745.

41. An analogy was drawn between the instant case and Hoffa v. United States, 385 U.S. 293 (1966), in which the seizure of an incriminating oral conversation was declared admissible over fifth amendment objections. In both the statements were voluntarily made: no force was exerted on the accused to incriminate himself. The fact that the conversation in *Hoffa* was seized when spoken and the records in *Andresen* were seized weeks after the communication was deemed to have no effect on compulsion. 96 S. Ct. at 2746.

42. Brief for Respondent, Appendix at A.182 — A.185., Andresen v. Maryland, 96 S. Ct. 2737 (1976). The accused was allowed to move about freely and his lawyer was present during the latter part of the search.

43. 96 S. Ct. at 2745. "[W]hen these records were introduced at trial, they were authenticated by a handwriting expert, not by petitioner."

recording of the document to the conviction was the accused ever compelled to take any affirmative act to incriminate himself.[44]

Examining the policy considerations underlying the fifth amendment,[45] the Court found nothing offensive about admitting the seized documents into evidence. Petitioner was not subject to perjury, contempt or self-accusation. Skillful investigation led to the documents, not inquisitorial pressure. Properly sworn warrants and courteous treatment of the petitioner throughout the search assured fair play and humane treatment.[46] Because the documents were already in existence at the time of the search, there was no possibility that they were self-deprecatory.[47] The right of each individual to a "private enclave where he may lead a private life"[48] was redefined in light of the *Fisher* decision. While admitting that the fifth amendment did protect privacy "to some extent," the Court, through a literal interpretation of the amendment, limited that protection to incriminating testimony that is compelled.[49]

Writing in dissent, Justice Brennan argued that the fifth amendment independently recognizes a zone of privacy within which the government may not compel the production of incriminating testimony against the will of the accused.[50] The purpose of this amendment is to provide "a private inner sanctum of individual feeling and thought."[51] The failure of the majority to include business records within this zone, noted the dissent, is an unwarranted retreat from well established principles.[52] Business records, which are required

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44. See Comment, *The Fourth and Fifth Amendments — Dimensions of an "Intimate Relationship"*, 13 U.C.L.A. L. REV. 857, 864 (1966) ("The fifth is applicable only when the individual is compelled to incriminate himself, and 'incriminating himself' implies an act on the part of the accused producing that result.").

45. 96 S. Ct. at 2746 n. 8 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)). "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 elicted 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'."

46. See note 42 *supra* and accompanying text.

47. See text accompanying note 41 *supra*.

48. 96 S. Ct. at 2746 n. 8 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

49. 96 S. Ct. at 2747. See text accompanying notes 62-64 *infra*.

50. This was a 7-2 decision with Justice Brennan dissenting on both fourth and fifth amendment issues. Justice Marshall agreed with Justice Brennan's fourth amendment dissent that the warrants were impermissibly general and therefore declined to consider the fifth amendment issue. *Id.* at 2754-55.

51. 96 S. Ct. at 2750 (quoting Couch v. United States, 409 U.S. 322, 327 (1973)).

52. 96 S. Ct. at 2751, *citing* Bellis v. United States, 417 U.S. 85, 87-88 (1974): "[T]he privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents. . . ." By quoting only this sentence, Justice Brennan failed to convey the complete thought expressed in *Bellis*. The next sentence explains that the fifth amend-

in a more complex society, are merely an extension of mental notes.[53] While these records have often been protected by invoking the fourth and fifth amendments together, earlier cases make it clear that a fourth amendment violation is not a prerequisite for invoking fifth amendment protection.[54] Justice Brennan cited dicta in several recent cases that specifically applied the fifth amendment privilege to business records in the possession of the sole practitioner.[55]

Justice Brennan also protested what he felt was an unjustified redefinition of compulsion. He argued that the majority's view was simplistic and neglected the fact that both a subpoena and a search and seizure are rife with compulsion and deny the individual the right to resist.[56] The similarity between subpoenas and search and seizures had first been noted in *Boyd* and until the instant decision, any seizure of testimonial evidence by legal process was given fifth amendment protection. Justice Brennan cited numerous cases in which compulsion was defined broadly as any taking against the will of the accused.[57] According to Justice Brennan, the overly strict definition of compulsion used by the instant Court ignores the historic use of the term and renders the fifth amendment right against compelled production of incriminating documents a hollow guarantee easily circumvented by utilizing a search warrant.[58]

The instant case is the first concrete interpretation of the fifth amendment privilege with respect to document production subsequent to the Court's decision overruling the *Boyd* fourth and fifth amendment's convergence theory. The Court in this case made it clear that the primary objective of the fifth amendment is to protect against self-incrimination; therefore, any protection of

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ment privilege is designed only to prevent compulsory production or authentication of incriminating documents.

53. 96 S. Ct. at 2751 (citing Fisher v. United States, 96 S. Ct. 1569, 1588 (1976). Justice Brennan cited to Olmstead v. United States, 277 U.S. 438, 474 (1928) in his dissenting opinion in *Fisher*.

54. 96 S. Ct. at 2752 (citing Bellis v. United States, 417 U.S. 85 (1973); Couch v. United States, 409 U.S. 322 (1972); Gouled v. United States, 255 U.S. 298, 306 (1921)). *Gouled* expanded the *Boyd* notion of compulsion to any unwilling taking of personal documents. Justice Brennan's fifth amendment zone of privacy would indeed be valid under this broad definition of compulsion. This zone of privacy does not exist without a broad notion of compulsion.

55. See note 52 *supra*. *See also* Couch v. United States, 409 U.S. 322, 333 (1973): "We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime." Again, any support Justice Brennan seeks from this case requires a broad definition of compulsion.

56. 96 S. Ct. at 2751. Justice Brennan expressed the view that the fifth amendment compulsion existed when the papers were extracted against the will of the accused.

57. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 302-03 (1967) (introduction into evidence of clothing worn during crime, compelled from accused during search subsequent to hot pursuit, does not violate fifth amendment because clothing is not testimonial); Schmerber v. California, 384 U.S. 757, 767 (1967) (compelled extraction of blood that incriminates accused admissible over fifth amendment objections because it is not testimonial). Both cases give the term compulsion a broad definition that encompasses any unwilling taking.

58. 96 S. Ct. at 2751.

privacy under the fifth amendment is merely derivative and not controlling.[59] To reach this position, the Court, in the words of one commentator, was forced to release the fifth amendment "from the moorings of precedent and determine its scope by the logic of its central concepts."[60] In redefining the fifth amendment, the Court relied on a literal interpretation of the words, consciously ignoring the "penumbras formed by emanations from those guarantees that help give them life and substance."[61]

Although denying that the protection of privacy is a critical factor, the Court maintained that the fifth amendment protects privacy "to some extent."[62] This measure of protection is limited to situations in which either the accused's own incriminating records are subpoenaed or the accused is forced to cooperate with law enforcement officials in procuring incriminating testimony. However, the Court declined to say that an individual is protected from complying with a subpoena, indicating only that he may be protected. Thus, it seems likely that in future decisions even compliance with a subpoena to produce incriminating documents might be required.[63] It is difficult to see how privacy is protected by the fifth amendment when law enforcement officials can search an apartment or office with impunity so long as the accused is not compelled to assist.[64] The Court's hesitation to do away with the privacy rationale altogether may be explained by a conservative reluctance to break abruptly with a legal theory that has been widely accepted by many courts since its creation in *Boyd*.

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59. The Court in Fisher v. United States, 96 S. Ct. 1569, 1575 (1976), stated that the fifth amendment protects privacy only "[w]ithin the limits imposed by the language of the Fifth Amendment" and unless compelled testimonial self-incrimination was involved privacy would not be served by the amendment.

60. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133. This article suggests that the logic of the fifth amendment should lead to more expansive interpretation. However, the broadening of the protection of privacy in *Katz* actually made the restriction of *Andresen* easier.

61. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). This choice is in harmony with Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 700-01 (1951) and Comment, *The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations*, 6 LOY. L.A.L. REV. 274, 309 (1973): "It is therefore proposed that the search and seizure of private papers should be regulated by privacy considerations rather than by any self-incrimination concepts." *But see* Comment, *Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis*, 69 NW. U.L. REV. 626, 651-52 (1974), which argues that the *Boyd* rationale is still valid and recommends that it be retained. *Compare* Comment, *Protection of the Right of Privacy in One's Personal Papers*, 1970 L. & SOC. ORDER 269, 277-78 (1970), expressing the view that neither the fourth nor fifth amendments can guarantee the privacy of papers but that such a right must be a penumbral right emanating from the first, third and ninth amendments.

62. 96 S. Ct. at 2747.

63. Fisher v. United States, 96 S. Ct. 1569, 1582 (1976), deliberately left unanswered "[w]hether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession. . . ." Language in the instant case makes the compulsory authentication of incriminating evidence the objectionable feature, 96 S. Ct. at 2747, but the discussion of authentication in *Fisher* suggests that if the government independently authenticates such documents no fifth amendment right would be violated. 96 S. Ct. at 1581-82.

64. Comment, *supra* note 44, at 865.

In excluding the protection of privacy as an objective of the fifth amendment, the Court did not escape the difficult problem of constitutional document production. The indiscriminate search and seizure of an individual's papers must now be prevented by the fourth amendment's prohibition of unreasonable searches.[65] Fortunately, the fourth amendment two tier privacy test can easily be adapted to include papers within its protection.[66] This test requires that the individual have an actual expectation of privacy and that society recognize that expectation as reasonable. A personal diary, for example, would clearly qualify for protection under this test,[67] as would private letters.[68] The Court still faces the problem of what other documents, if any, should be included within this zone of privacy.[69] While private papers will have some fourth amendment protection, however, this protection comes into play only where there has been an unreasonable search and seizure. Thus, practitioners must regard incriminating documents in the possession of the accused as potentionally damaging evidence.

Having shifted the primary responsibility for the protection of privacy to

65. "In light of the limited protection afforded private papers by the fifth amendment, it is necessary to look to the right of privacy guaranteed by the fourth amendment. . . ." Comment, *Protection of the Right of Privacy in One's Personal Papers*, 1970 L. & SOC. ORDER 269, 273.

66. In his concurring opinion in Katz v. United States, 389 U.S. 347, 361 (1967), Justice Harlan acknowledged the shift of fourth amendment emphasis from property to privacy. See note 24 *supra*.

67. Courts have been reluctant to admit a personal diary into evidence where it is strictly personal, well hidden or protected, and expected by its owner to remain private. *See, e.g.*, United States v. Stern, 225 F. Supp. 187 (S.D.N.Y. 1964). However, it is possible that an individual might waive his expectation of privacy, causing his diary to lose its fourth amendment protection. Judge Friendly in United States v. Bennett, 409 F.2d 888, 897 (2d Cir. 1969) stated that a personal diary entitled "Robberies I have Performed" found during a search should be admissible. Because the entire diary must be read to glean the incriminating entries, Judge Friendly found such a process objectionable on overbreadth grounds.

ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Official Draft No. 1, 1975) §210.3(2) addresses this point directly: "[T]hings subject to seizure . . . shall not include personal diaries, letters, or other writings or recordings, made solely for private use . . . unless such things have served or are serving a substantial purpose in furtherance of a criminal enterprise." Sections 220.4(2), (3) provide additional safeguards to insure that an individual's fourth amendment privacy rights are not violated.

68. Personal letters from one individual to another cannot be intra-personal because they are communications between two people. However, they are often very private in nature and the recipient often considers them to be within his or her sphere of personal privacy. If such letters are not actual instrumentalities of crime and unless strong probable cause exists that they have played a substantial role, their seizure should be prohibited as an unreasonable invasion of the fourth amendment right to privacy. *See* Comment, *Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis*, 69 NW. U.L. REV. 626, 635-36, 647-52. See also note 6 *supra*.

69. Personal financial records utilized by an individual to prepare his or her own income tax form are a particularly difficult category of documents. This topic has given rise to a host of articles. *See, e.g.*, Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1, 34-43 (1966) (the required records doctrine inherent in the IRS code denies the accused fifth amendment protection; see note 21 *supra*); Note, *Civil Versus Criminal: Taxpayers' Rights Under the Fourth and Fifth Amendments*, 38 BROOKLYN L. REV. 130, 136-142 (1971).

the fourth amendment, the Court focused its attention once again on the fifth amendment and reevaluated the test for determining the requisite compulsion to invoke the fifth amendment. The Court rejected the idea that any compulsion was sufficient to invoke fifth amendment protection; instead it required that the accused be compelled to take some affirmative action to incriminate himself.[70]

While this new definition of compulsion is in direct conflict with much case law that had arisen from *Boyd*, it represents a narrow approach which is in harmony with a host of legal theorists who since the early 1900's have called for a reappraisal of the fifth amendment.[71] Wigmore, in his first treatise on evidence in 1905, characterized the expansion of the privilege as defying common sense and predicted a return to limited privilege.[72] Another commentator recommended that the fifth amendment be changed through legislative action because he felt that the Court was incapable of retracing the "path of error" that began with *Boyd*.[73] Judge Friendly in 1968 reemphasized the need to consider a constitutional amendment absent "evidence of a change in judicial attitude."[74] He advocated abolition of any fifth amendment privilege with respect to documents, claiming that this protection was the role of the fourth amendment.[75] The restriction of the fifth amendment to its actual language reflects both a change of judicial attitude and a vindication of the position taken by these theorists.

On a more pragmatic level, the instant case reflects the inherent tension that results from the conflict between societal interests in effective crime prevention and the constitutional rights of the accused. Recent changes in the makeup of the Court have shifted this balance of interests towards society's interest in convicting lawbreakers.[76] With the substantial increase in white collar crimes such as tax evasion, fraud and embezzlement,[77] effective law enforcement demands greater access to documents that are often in the hands of the accused. The Court, in the instant case, by drastically narrowing the scope of the fifth amendment, has given law enforcement agents the ability to search for and seize business records. It has thus furthered a necessary societal inter-

70. 96 S. Ct. at 2745. See text accompanying note 38 *supra*.

71. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (Justice Cardozo, speaking for the Court suggests that immunity from self-incrimination could be discarded and justice would still be done); Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 191, 207 (1930) (the erroneously expanded privilege will be restricted); Terry, *Constitutional Provisions Against Forcing Self-Incrimination*, 15 YALE L.J. 127, 129-30 (1906). For a thorough listing of those attacking the expanded fifth amendment privilege, see 8 J. WIGMORE, EVIDENCE §2251 (3d ed. 1940); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 672-76 (1968).

72. 4 J. WIGMORE, EVIDENCE §2251 (1st ed. 1905).

73. L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 207, 214 (1959).

74. Friendly, *supra* note 71, at 726.

75. *Id.* at 701-03.

76. *See* Dershowitz and Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1199, 1227 (1971). The authors of this article urge moderation by the Court in shifting the balance between "liberty" and "order" back in the direction of "order."

77. *See generally Symposium on White Collar Crime*, 11 AM. CRIM. L. REV. 817 (1973).